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In The

Supreme Court of the United States

October Term, 1995

HOWARD SCOTT SIMPSON,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A CRIMINAL PROSECUTION AFTER THE ASSESSMENT OF A STATE DRUG TAX AND ONE HUNDRED PERCENT PENALTY FOR THE POSSESSION OF MARIJUANA, IMPOSED PRIOR TO AND INDEPENDENTLY OF THE CRIMINAL PROCEEDING, VIOLATE DOUBLE JEOPARDY PRINCIPLES ESTABLISHED IN *DEPARTMENT OF REVENUE OF THE STATE OF MONTANA V. KURTH RANCH*, 511 U.S. ___, 114 S.CT. 1937 (1994)?

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OPINIONS BELOW

The opinion of the Kansas Supreme Court is reported, *State v. Simpson*, 259 Kan. 781 (Kan.1996), and is reprinted in the Appendix at 1. The opinion of the district court is unreported and is reprinted in the Appendix at 28.

JURISDICTION

The decision of the Kansas Supreme Court was filed April 19, 1996. This petition for certiorari was timely filed within ninety (90) days of that date. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

THIS QUESTION CONCERNS THE CHARACTER OF A TAX ASSESSMENT AND ONE HUNDRED PERCENT (100%) PENALTY UNDER THE KANSAS DRUG TAX ACT, K.S.A. 79-5201 ET SEQ. THE KANSAS DRUG TAX ACT IS SET OUT IN THE APPENDIX AT 45. THE PROVISION OF THE UNITED STATES CONSTITUTION INVOLVED IN THIS QUESTION IS THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE FIFTH AMENDMENT IS SET OUT IN THE APPENDIX AT 53.

STATEMENT OF THE CASE

Petitioner was arrested and charged on May 2, 1994, with violating K.S.A. 65-4127(b), possession of marijuana with intent to sell, a severity level 3 non-person felony. Subsequently, on May 16, 1994, the Kansas Department of Revenue in a separate, independent proceeding imposed the Kansas Drug Tax of $7,840.00 and one hundred percent penalty ($7,840.00) for a total assessment of $15,680.00. See Appendix at 42.

Petitioner moved to dismiss because prior imposition of the Kansas Drug Tax constituted punishment thus barring his subsequent criminal prosecutions under the Fifth Amendment (see Appendix at 54). The trial court granted this motion January 9, 1995, and dismissed Count II, possession of marijuana with intent to sell, making these pertinent findings of fact:

1) The Kansas tax on marijuana is extremely high;

2) The Kansas tax on marijuana is obviously imposed for a deterrent and punitive reason;

3) The Kansas tax on marijuana is conditioned upon the commission of a crime;

4) The Kansas tax on marijuana is levied upon goods which the taxpayer never legally possessed.

5) The notice stated KDR had levied a tax upon the marijuana seized of $7,840.00 based upon a statutory rate of $3.50 per gram.

6) KDR assessed a 100% penalty.

7) That the total tax and penalty due was $15,680.00. (See Appendix at 42).

The State appealed the dismissal of Count II, possession with intent to sell, to the Kansas Supreme Court, Docket No. 95-73467-S. The Kansas Supreme Court reversed the dismissal of Count II, possession of marijuana with intent to sell, on double jeopardy grounds because the Kansas drug tax did not have the two "unusual" features necessary to constitute punishment.

ARGUMENT

THE DECISION OF THE KANSAS SUPREME COURT THAT THE KANSAS DRUG TAX AND ITS ONE HUNDRED PERCENT (100%) PENALTY DOES NOT CONSTITUTE PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES IS IN DIRECT CONFLICT WITH DECISIONS OF THE COURTS OF ILLINOIS, INDIANA, NEVADA, TEXAS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. ___, 114 S.CT. 1937 (1994).

A. The Kansas decision improperly interprets the holding in *Kurth* by creating an "unusual features" test instead of looking at the tax as a whole to determine whether it constitutes punishment for jeopardy purposes.

The Kansas Drug Tax and the Montana Dangerous Drug Tax found to constitute punishment in *Kurth* are essentially the same. The Montana and Kansas Drug Taxes accomplish the same purpose, punishment. First, the entire class of taxpayers subject to this tax are persons in possession of marijuana illegally. Second, the rate of

taxation is essentially the same, Montana, $100 per ounce of marijuana, Kansas, approximately $98 per ounce of marijuana. Unlike Montana, the Kansas tax must be paid every three months instead of once and includes a 100% penalty if not paid before arrest. Consequently, if one applies the Kansas tax to the facts in *Kurth,* the actual tax rate for one year is 64 times market value instead of the 8 times market value found in *Kurth* to constitute punishment for jeopardy purposes. *Dept. of Revenue of Montana v. Kurth Ranch,* 114 S.Ct. 1937 (1994). Despite these similarities and the higher effective rate of taxation under the Kansas Drug Tax, the Kansas court found the drug tax not to constitute punishment. See *State v. Gulledge,* 257 Kan. 915, 896 P.2d 378 (Kan.1995); *State v. Jensen,* 259 Kan. 781 (Kan.1996).

The Montana Dangerous Drug Tax constituted punishment for double jeopardy purposes because:

> "*Taken as a whole,* this drug tax is a concoction of anomalies too far removed in crucial respects from the standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." (Emphasis ours),

Kurth, 114 S.Ct. at 1948, which conclusion correctly describes the Kansas Drug Tax. *Kurth* did not establish a rigid "unusual features" test, but rather scrutinized the whole tax to determine whether it constituted punishment for double jeopardy purposes. The Kansas Supreme Court cannot exempt the Kansas Drug Tax from *Kurth* simply because the Kansas tax provisions are not identical to Montana's. The question is not how the tax is written or its idiosyncrasies, but does its application constitute punishment.

The Kansas court erroneously created an "unusual features" test to distinguish *Kurth* and avoid holding "as a whole" the Kansas drug tax is punishment. *Kurth* did not use an "unusual features" test but examined the drug tax "as a whole" before concluding it was punishment. Further, Montana and the Kansas Drug Tax provisions are too similar to justify the Kansas court's holding both "unusual" features must be present for the tax to be punishment.

The first "unusual feature" of the Montana tax is it can only be assessed after the commission of a crime. This "unusual feature" of the Montana tax is present in the Kansas Drug Tax. See K.S.A. 1995 Supp. 79-5201(c):

> " 'dealer' means any person who, *in violation of Kansas law*, . . . possesses more than 28 grams of marijuana . . . " (Emphasis ours).

Consequently, the class of taxpayers subject to this act are people who illegally possess marijuana.[1] Significantly, the issue is not the constitutionality of the classification, but whether the tax and/or its rate of tax constitutes punishment. Therefore, this "unusual feature" is fiction.

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[1] The Illinois Supreme Court holding the Illinois tax to constitute punishment concludes, in direct conflict with the Kansas Supreme Court, that the tax liability was only created upon the commission of a crime because the very definition of "dealer", "not only assumes a crime has been committed, it also presupposes that the offending party has been arrested, charged and convicted." *Wilson v. Department of Revenue*, 662 N.E.2d 415, 420 (Ill.1996). See, also, *Bryant v. State*, 660 N.E.2d 290 (Ind.1995); *Desimone v. State*, 904 P.2d 1 (Nev.1995); *Stennett v. State*, 9805 S.W.2d 612 (Tex.App.1995); *Ward v. State*, 915 S.W.2d 941 (Tex.App.1996).

The second "unusual feature" of the Montana Drug Tax is the tax is levied only after an arrest resulting in the seizure of the drugs from the taxpayer. In Kansas, the taxpayer, after his arrest, is not allowed to keep the marijuana whether the tax stamp is affixed or not. Under both Montana and Kansas drug tax laws, the taxpayer pays a tax on property that he/she will not be allowed to keep, and, therefore, this alleged difference, or "unusual feature" is fiction. The Kansas tax, in reality, will be assessed after arrest[2] and its rate doubled by imposition of the 100% penalty for not paying the tax when statutorily due, K.S.A. 1995 Supp. 79-5208, which "as a whole" represents greater punishment than *Kurth*, i.e., a double taxation rate on property seized from and will not be returned to the taxpayer.

The Kansas tax is clearly punitive. First, the tax is imposed every three months from the time of initial possession, which quadruples the effective tax rate per year. Second, since it was anticipated by the State that no one would pay the tax when due, the 100% penalty again doubles the rate of taxation, K.S.A. 1995 Supp. 79-5208, resulting in a potential tax rate approximately 64 times market value per year under the facts present in *Kurth*.

---

[2] The Kansas Drug Tax from 1991 through June, 1996, generated $3,914,096 in revenue of which less than 0.41% and/or .0041 ($15,990) was collected before arrest. KDR, June 18, 1996.

B. State Appellate Courts are divided in their interpretation of *Kurth* creating directly conflicting decisions.

Kansas, Alabama, Connecticut, Iowa, Nebraska, and South Carolina have all held that their state drug taxes do not constitute punishment for double jeopardy purposes, while, Texas, Illinois, Indiana, and Nevada have all found their drug taxes constitute punishment as defined by the 5th Amendment and *Kurth*, to-wit:

STATE	Tax Rate	Frequency	Penalty	Test Used	HOLDING
Montana	$100 / ounce	Once only	None	*Kurth*	IS punishment
Kansas	$ 98 / ounce	Every 3 mos.	100%	unusual features test	NOT punishment
Alabama	$ 98 / ounce	Once only	100%	unusual features test	NOT punishment
Connecticut	$ 98 / ounce	Once only	100%	unusual features test	NOT punishment
Illinois	$140 / ounce	Once only	400%	tax as whole	IS punishment
Indiana	$1120 / ounce	Every 48 hrs	100%	tax as whole	IS punishment
Iowa	$140 / ounce	Once only	100%	unusual features test	NOT punishment
Nebraska	$100 / ounce	Every 6 mos.	100%	Different offense	NOT punishment
Nevada	$2800 / ounce	Once only	None	tax as whole	IS punishment
S. Carolina	$ 98 / ounce	Once only	100%	unusual features test	NOT punishment
Texas	$ 98 / ounce	Once only	10%	tax as whole	IS punishment

See *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995) (upholding Kansas tax) (Appendix at C); *Milner v. State*, 658 So. 2d 500 (Ala.Civ.App. 1994), *cert. denied*, (upholding Alabama tax); *Covelli v. Commissioner of Revenue Services*, 668 A.2d 699 (Conn. 1995) (upholding Connecticut tax); *State v. Stubblefield*, 543 N.W. 743 (Neb. 1996) (upholding Nebraska tax); *McMullin v. South Carolina Dept. of Rev. and Taxation*, 469 S.E.2d 600 (S.C. 1996) (upholding South Carolina tax); *Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996) (striking down Illinois tax); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995) (striking down Indiana tax); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *Desimone v. State*, 904 P.2d 1 (Nev. 1995) (striking down Nevada tax); *Ward v. State*, 915 S.W.2d 941 (Tex.App. – Houston [1st Dist.] 1996) (striking down Texas tax); *Stennett v. State*, 905 S.W.2d 612 (Tex.App. – Houston [14th Dist.] 1995) (striking down Texas tax).

Kansas, Alabama, Connecticut, Iowa, South Carolina, and Nebraska have all interpreted *Kurth* as establishing an "unusual features" test meaning if their respective drug tax does not contain the unusual features of the Montana tax, the tax is not punishment regardless of the punitive nature of the tax when taken as a whole, *e.g.*, the tax rate may be higher, there may be a high penalty for failure to pay the tax before arrest, the tax may be due multiple times per year. (See chart, supra).

Texas, Illinois, Indiana, and Nevada, on the other hand, all interpret *Kurth* to hold that the tax as a whole must be scrutinized to determine whether or not the tax constitutes punishment. In *Stennett v. State*, 905 S.W.2d

612 (1995), the Texas court, held that the "unusual features" analysis was an inappropriate standard to determine the intent and nature of the tax itself. The Texas tax imposed a $98/ounce tax on marijuana due upon commission of the illegal possession, which is identical to the Kansas tax in question. The Texas tax was due only once upon possession with a 10% penalty for failure to timely pay the tax. The Kansas tax is due every three months and establishes a 100% penalty for failure to timely pay. Even though the Texas tax is less punitive than the Kansas tax and is due before arrest, as is the Kansas tax, for the underlying criminal possession, the Texas Court held the tax clearly constituted punishment for double jeopardy purposes.

The status quo is one of confusion. Kansas, Alabama, Connecticut, Iowa, South Carolina and Nebraska have all held the fact the tax liability exists before arrest to be controlling and their taxes, therefore, do not constitute punishment. In direct conflict, Illinois, Indiana, Nevada and Texas have all held the fact the tax is technically due before arrest is not controlling and their respective drug taxes do constitute punishment.

This issue has not been resolved. The United States Supreme Court granted certiorari, vacated judgment and remanded for further consideration two Texas cases originally holding their state drug tax did not constitute punishment for jeopardy purposes. *Ward v. State*, 915 S.W.2d 941 (Tex.App. [1st Dist.] 1996); *Stennett v. State*, 905 S.W.2d 612 (Tex.App. [14th Dist.] 1995). On remand, both cases were reversed finding the Texas tax to constitute punishment.

Certiorari was denied on Alabama case holding their state drug tax was not punishment. *Milner v. State*, 658 So.2d 500 (Ala.Civ.App.1994). Finally, both *Covelli v. Commissioner of Revenue Services*, 668 A.2d 699 (Conn.1995) (holding the Connecticut drug tax due before arrest of $100/ounce was not punishment), and *Desimone v. State*, 904 P.2d 1 (Nev.1995) (holding Nevada's drug tax due before arrest of $2800/ounce was punishment), were granted certiorari, their judgments vacated and remanded to their respective state courts for further consideration in light of *United States v. Ursery*, 518 U.S. ___ (1996); 1996 WL 138116 (U.S.Conn.); 1996 WL 18676 (U.S.Nev.). Therefore, state appeals courts are still divided over the correct interpretation of *Kurth*.

In summary, *Kurth* should be revisited because of (1) the conflicting holdings by state appellate courts construing how *Kurth* should be interpreted and applied; (2) six states, including Kansas, have interpreted *Kurth* to establish an "unusual features" test meaning if the tax does not have the identical features of the Montana tax, it is not punishment, thereby abrogating *Kurth*'s intended protection against double jeopardy, *e.g.*, the Kansas tax rate is equivalent to or potentially eight times higher than Montana's yet held not to constitute punishment.

CONCLUSION

The decision of the Kansas Supreme Court is in direct conflict with decisions of the courts of Texas, Illinois, Indiana and Nevada and this court's decision in *Department of Revenue of the State of Montana v. Kurth Ranch*, 511

U.S. ___, 114 S.Ct. 1937 (1994). The conflicts are irreconcilable.

For the foregoing reasons, petitioner respectfully requests this Court grant his Petition for a Writ of Certiorari and in the alternative grant his Petition for Writ of Certiorari, vacate the Kansas Supreme Court's judgment and remand for further consideration.

Respectfully submitted,

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APPENDIX

State v. Simpson, 259 Kan. 781 (Kan.1996).....App. 1

Opinion of the Ellis County District Court, Case No. 94-CR-184, January 9, 1995, granting motion to dismiss on double jeopardy grounds.....App. 28

Notice of Tax Assessment Tax Warrant.....App. 40

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Motion to Dismiss – Double Jeopardy.....App. 54

State v. Gulledge, 257 Kan. 915, 896 P.2d 378 (Kan.1995).....App. 57

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 73,406

STATE OF KANSAS,
Appellee,

v.

ROY L. JENSEN,
Appellant.

No. 73,467

STATE OF KANSAS,
Appellant,

v.

ROY L. JENSEN,
Appellee,

No. 73,578

STATE OF KANSAS,
Appellant,

v.

HOWARD SCOTT SIMPSON,
Appellee,

SYLLABUS BY THE COURT

1.

Generally, a party against whom a search warrant is directed may not dispute the matters alleged in the supporting affidavit or application. Under the exception to this general rule, a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), is required if the affiant is an officer or agent of the State and the defendant makes a showing supported by sworn allegations that the affidavit or application for the search

warrant contained a false statement made knowingly, intentionally, or with reckless disregard for the truth, and the false statement is necessary to a finding of probable cause.

2.

The Kansas Drug Tax Act, K.S.A. 79-5201 *et seq.*, does not impose a criminal penalty for purposes of double jeopardy under the United States and Kansas Constitutions.

Appeal from Ellis district court; EDWARD BOUKER, Judge. Opinion filed April 19, 1996. Affirmed in part, reversed in part, and remanded.

Michael S. Holland, of Russell, argued the cause and was on the briefs for appellant/appellee Roy L. Jensen and appellee Howard Scott Simpson.

Glenn R. Braun, county attorney, argued the cause, and *Carla J. Stovall,* attorney general, was with him on the brief for appellee State of Kansas, and *Scott J. Miller,* assistant county attorney, was with them on the brief for appellant State of Kansas.

Brian Cox, of Topeka, was on the briefs for *amicus curiae* Kansas Department of Revenue.

The opinion of the court was delivered by

ALLEGRUCCI, J.: The State of Kansas appeals from the district court's dismissal of possession of marijuana charges in two separate criminal cases in which the court held the prosecution would constitute double jeopardy. Jensen appeals from his conviction of possessing marijuana without paying the drug tax and the denial of this

motion to suppress the evidence seized from a search of his residence. The cases have been consolidated on appeal.

Two issues are raised in this consolidated appeal:

1. Should the evidence seized from Jensen's residence have been suppressed because the warrant-issuing judge was misled by the informant's testimony?

2. Does assessment and partial or complete satisfaction of tax and penalty under the Kansas Drug Tax Act, K.S.A. 79-5201 *et seq.*, bar subsequent criminal prosecution on a charge arising from possessing the drug?

Jensen filed a motion to suppress evidence obtained during execution of a search warrant at his residence. A hearing was conducted, and the district court filed a written decision denying the motion. At the urging of Jensen, the district court clarified its earlier decision by filing findings of fact and conclusions of law in formally numbered paragraphs. The findings of fact were as follows:

> "1. On June 22, 1993, David Zellmer, a Sheriff's Deputy and a member of the Ellis County Drug Enforcement Unit was called out of a meeting to talk to a man by the name of Robert Kiehl.
>
> "2. Deputy Zellmer did not know Kiehl well, and had only met him once before, approximately two weeks prior to June 22, 1993. On this earlier occasion, Detective Tom Meiers of the Hays Police Department asked Zellmer to take Kiehl home in an unmarked car. Kiehl was a witness in an investigation being carried on by

Detective Meiers. This investigation was unrelated to any of the matters presented in the above captioned case.

"3. During the course of the June 22, 1993 conversation, Kiehl told Zellmer that Roy Jensen was selling marijuana and growing it in Jensen's home. Kiehl further stated that he had been to Jensen's home with Chad Weilert, and that Weilert had purchased $200.00 or $250.00 worth of marijuana from Jensen. At this time, Kiehl stated that he saw 50 to 100 marijuana plants in Jensen's basement, and described the conditions under which these plants were being grown.

"4. On the morning of June 23, 1993, Deputy Zellmer had Kiehl appear at the Ellis County Law Enforcement Center. Zellmer interviewed Kiehl. During this interview, Kiehl gave an accurate description of Roy Jensen, with whom Zellmer was acquainted. Kiehl also described certain vehicles which belonged to Jensen, described Jensen's home, and the general area in Hays, Kansas where the Jensen home was located. Kiehl did not know the street address of the Jensen home.

"5. Zellmer, in an effort to corroborate Kiehl's story, put Kiehl in Zellmer's vehicle, with Zellmer driving, and asked Kiehl to direct him to the Jensen home. Kiehl did so, and Deputy Zellmer was able to observe the Jensen home, which matched Kiehl's previous description. The motor vehicles previously described by Kiehl were at the Jensen residence.

"6. At some point in time after the June 22, 1993 conversation between Deputy Zellmer and Kiehl, Zellmer contacted Detective Jim Braun of the Hays Police Department, also a member of

the Ellis County Drug Task Force. Braun was asked by Zellmer to assist in the investigation.

"7. Additional means of corroborating Kiehl's story were considered. Detective Zellmer considered checking Jensen's city water bill and his electric bill to determine whether water and electricity consumption were consistent with a marijuana growing operation. Investigation determined that Jensen had a water well at his home, and therefore city water usage information was unavailable or would not be reliable. Midwest Energy, which supplies power utilities to Jensen's home, would not release power consumption information without a warrant.

"8. Deputy Zellmer and Detective Braun decided that Kiehl should personally appear before judge Tom Scott of the Ellis County District Court, as neither officer knew Kiehl well, and they were unable to find any additional corroboration for his story. The officers desired that Judge Scott be able to see and hear Kiehl's testimony, and be able to reach his own conclusions about Kiehl's reliability.

"9. Kiehl appeared before Judge Scott on June 23, 1993 and gave testimony under oath in support of an application for a search warrant authorizing a search of Jensen's home. A search warrant was issued by Judge Scott on that date.

"10. As a result of a search of the Jensen home under authority of the warrant, marijuana and paraphernalia were found; however, no growing marijuana was found in the basement of the Jensen home. The only growing plant that was recovered as a result of the search was a plant growing in the back yard of the Jensen residence.

"11. As a result of items found in the search conducted, Jensen was charged in this case.

"12. Robert Kiehl was not at any time relevant to this case a law enforcement officer or government employee. He was not acting at any time relevant hereto on behalf of any governmental agency, or in any capacity, or under any circumstances by virtue of which his actions could be considered governmental action.

"13. Neither Deputy Zellmer nor Detective Braun knew or had reason to know of any matter in Kiehl's background which would cast doubt on his veracity or reliability, including, but not limited to, any knowledge of mental disease, disability or treatment history.

"14. The two officers did not tell Judge Scott, at the time the application for search warrant was being considered, that they had attempted to corroborate Kiehl's testimony through water and electricity bills.

"15. Defendant filed a motion to suppress the evidence seized in the search on the basis that the testimony of Kiehl in support of the search warrant was perjured. In support of this motion, defendant attached the sworn testimony of Chad Weilert and the affidavit of Roy Jensen.

"16. The law enforcement personnel who executed the search warrant, and all officers connected with the warrant and the search did so in good faith reliance upon the search warrant."

The record on appeal also reveals the following facts pertaining to the search of Jensen's residence:

The application for search warrant is dated Wednesday, June 23, 1993, at 10:34 a.m. Detective Jim Braun was the affiant. In the space for attested facts upon which the application is based, there is only the notation, "(oral affidavit)." The "oral affidavit" was made when Detective Braun was sworn in and Kiehl and Deputy Zellmer gave sworn testimony in the presence of a district judge. Questions were asked of them by the county attorney.

Kiehl stated that he had gone to Jensen's residence on Saturday, June 19, with Chad Weilert. Kiehl said that they went there because Weilert wanted to spend approximately $200 to $250 for a bag of marijuana. Inside the house, Jensen told Weilert that he has a bag for him and asked Weilert to go downstairs. There Kiehl saw Jensen hand Weilert a sandwich bag of marijuana.

Kiehl also described seeing 50 to 100 marijuana plants in containers. He estimated the plants to be "[o]ver a foot," "maybe thirteen, fourteen" inches, and between 1 and 2 feet. Each plant was individually potted, and there were lights around the plants.

Kiehl testified that he had not been promised anything in exchange for the information about Jensen, that his giving the information was completely voluntary, and that he had no personal animosity toward Jensen.

There was little in Kiehl's brief testimony from which the judge who issued the search warrant reasonably could have drawn conclusions about his trustworthiness. Kiehl said he had lived in Ellis County approximately 2 or 3 years, he knew Jensen, Jensen's house, and Jensen's vehicles, he used drugs until approximately 6 months to a year before the hearing, he contacted Deputy Zellmer

"about another situation in regards to a girl that I live with, in regards to an incident that she pulled in Wichita," and he might be a witness in another case in which he was working with detective Meiers.

Deputy Zellmer testified that his only contact with Kiehl before June 22 was when he had spent about 5 minutes driving Kiehl home in an undercover vehicle at the request of detective Meiers. Zellmer also testified that he had understood from Kiehl that he had been in Jensen's basement on Monday evening rather than on Saturday. And finally, Zellmer stated that Kiehl's description of the lights in Jensen's basement was "somewhat vague."

No marijuana plants were found in the house. In the back yard three 6-inch marijuana plants were found in two styrofoam cups. No lights or lighting equipment were found. The search did yield marijuana in brick form in a quantity greater than would be presumed to be for personal use, paraphernalia, scales, plastic bags, and marijuana buds and seeds.

There is no dispute about the facts pertaining to the double jeopardy issue for either Jensen or Simpson. With regard to Jensen, the district court stated:

> "On June 23, 1993, pursuant to a search warrant issued out of this Court, officers of the Ellis County Drug Task Force searched defendant's home. A quantity of marijuana was found and seized, resulting in the present charges. (See Affidavit in Support of Search Warrant). On July 9, 1993, The Kansas Department of Revenue, Division of Alcoholic Beverage Control, Drug

Tax Administration issued a Notice of Assessment of Tax Upon Marijuana and a Controlled Substance.

"The Notice states that the KDR has levied a tax upon the marijuana seized of $9,975.00, based upon the statutory tax rate of $3.50 per gram or portion thereof. In addition, the Department assessed a 100% penalty. The total tax due as stated in the Notice is $19,950.00, and a tax warrant was issued for that amount. The tax warrant is also dated July 9, 1993. (See Defendant's Exhibits 1 & 2).

"The parties have stipulated that a sum in excess of $18,000.00 has been seized by KDR from defendant's bank account under the tax warrant, in substantial satisfaction of the tax and penalty due."

With regard to Simpson, the district court stated:

"On May 2, 1994, the defendant was stopped by officers of the Hays Police Department for operating a vehicle with an expired license tag. While at the scene of the stop, officers looked through the window of the defendant's pickup and, with the aid of a flashlight, saw a large bag of what appeared to be marijuana. Defendant was arrested and charged with three counts of violation of the law: Count I, possession of marijuana upon which a tax is imposed without a stamp affixed proving payment of the tax in violation of K.S.A. 79-5204 and 5208; Count II, possession of marijuana with intent to sell in violation of K.S.A. 65-4127b as amended; and Count III, driving [an] unregistered vehicle in violation of K.S.A. 8-142.

> "On May 16, 1994, The Kansas Department of Revenue, Division of Taxation issued a Notice of Assessment of Tax Upon Marijuana and a Controlled Substance. The Notice states that the KDR has levied a tax upon the marijuana seized of $7,840.00, based upon the statutory tax rate of $3.50 per gram or portion thereof. In addition, the Department assessed a 100% penalty. The total tax due as stated in the Notice is $15,680.00, and a tax warrant was issued for that amount. The tax warrant is also dated May 16, 1994. The parties have stipulated that a motorcycle belonging to the defendant has been seized by KDR under the tax warrant, in partial satisfaction of the tax and penalty due."

We first consider if the evidence seized from Jensen's residence should have been suppressed due to the warrant-issuing judge's having been misled by the informant's testimony. Jensen contends that the warrant to search his house was improperly obtained. His theory starts with the premise that he established at the hearing on his motion to suppress that most material statements in the affidavit were false. He contends that Kiehl, the one who made the false statements, was a government agent and that the State failed in its duty to provide information bearing on his credibility to the judge who was reviewing the warrant application. It is Jensen's position that what remains of the affidavit after false statements are removed is insufficient to establish probable cause for issuance of the search warrant.

The State contends that findings of the district court control for the purpose of this review. The district court conducted a hearing on Jensen's motion to suppress at which the defendant presented evidence which tended to

undermine the credibility of all aspects of Kiehl's testimony. After studying authorities cited by the State, the district court concluded that no hearing should have been conducted. It concluded that, because Jensen had failed to show that Kiehl was a government agent, the affidavit could not be impeached. In the words of the district court, "[t]he defendant is, therefore, not entitled to a finding by this court as to the truth or falsity of Kiehl's testimony in search of the warrant." In addition, the district court concluded that there had been no deliberate or reckless suppression of material fact by the police officers involved in obtaining the search warrant. Finally, the district court concluded that the search was executed in good faith reliance on a the warrant so that evidence seized during the search should not be suppressed.

Generally, a defendant may not dispute allegations in the affidavit upon which a search warrant was issued against him. *State v. Jacques*, 225 Kan. 38, Syl. ¶ 4, 587 P.2d 861 (1978). Following *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), this court created an exception to the general rule where the defendant's "attack is supported by allegations and an offer of proof under oath that the affidavit or application for search warrant contains material statements of deliberate falsehood or of reckless disregard for the truth." 225 Kan. 38, Syl. ¶ 5. Here, the district court's principal rational in overruling Jensen's motion to suppress was that the exception, although not specifically stated in *Jacques*, was applicable if the material statements of deliberate falsehood or of reckless disregard for the truth *were made by a government agent.*

The State contends that the district court's interpretation of *Franks* and *Jacques*, although unexpressed in those cases, is intrinsic in those decisions. The State offers the rationale that the Fourth Amendment protects a criminal defendant against government misconduct but not against misconduct of a private citizen. The district court also noted that the exclusionary rule was "designed to deter investigatory agents of the government from violating constitutional mandates." This view was expounded in *State v. Moore*, 54 Wash. App. 211, 773 P.2d 96, *rev. denied* 113 Wash. 2d 1027, 782 P.2d 1071 (1989), which was quoted by the district court in its memorandum decision and is relied on by the State on appeal:

> "A defendant is entitled to an evidentiary hearing upon making a 'substantial preliminary showing' that an officer or an agent of the State knowingly or recklessly made a false statement that was the basis of a court's probable cause finding. *State v. Thetford*, 109 Wn.2d 392, 398, 745 P.2d 496 (1987) (a/k/a a *Franks* hearing, *see Franks v. Delaware*, 438 U.S. 154, 155, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)). The theory behind the *Franks* hearing is that the government is never permitted to benefit from its own misconduct. The *Franks* hearing arose as an exception to the 'four corners' rule, which does not permit challenges to facially valid affidavits establishing probable cause. *See, e.g. United States v. Bowling*, 351 F.2d 236, 241-42 (6th Cir. 1965); Annot. 5 A.L.R. 394 (1949). The *Franks* hearing was instituted to detect and deter the issuance of warrants based on information gathered as a result of governmental misconduct. *See Thetford*, at 399.

> "If, however, a nongovernmental affiant provides testimony upon which a warrant is based and that testimony is later shown to have been intentionally false or gathered by means that would constitute a constitutional violation if done by a governmental agent, *Franks*, nonetheless, does not apply. *Thetford*, at 398; 2 W. LaFave, *Search and Seizure* § 4.4(b) (1987). *Franks* does not apply in such instances because there exists no governmental misconduct that could be detected or deterred by a *Franks* hearing." 54 Wash. App. at 214-15.

Applying the principle to the facts of its case, the Washington Court of Appeals stated: "Accordingly, to be entitled to a *Franks* hearing, appellant must establish by a 'substantial preliminary showing' (1) that [the informant] was a governmental agent, and (2) that [the informant] made false statements to the magistrate." 54 Wash. App. at 215. The Washington Court of Appeals found that Moore had established neither. *Moore*, as the ruling of an intermediate court of another state, is not controlling, but it is persuasive.

Although the *Franks* Court did not expressly limit the exception to an affidavit sworn to by a government agent, we agree with the State that it is intrinsic to the decision. In its holding, the *Franks* Court said: "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." 438 U.S. at 171. The affidavit in support of the search warrant in *Franks* was sworn to by two police detectives.

In *Jacques*, we applied the *Franks* exception. However, the only reference to the identity of the affiant was "that

the applicant who applied for the search warrant was lying because the name of the informant on which he relied was confidential and could not be discovered; therefore defendant alleged the informant never existed." 225 Kan. at 44. In *Jacques*, we state the general rule as "a party against whom a search warrant is directed may not dispute the matters alleged in the supporting affidavit or application." 225 Kan. 38, Syl. ¶ 4. However, following *Franks*, the exception to the general rule was applied in *Jacques*, and we concluded no hearing was required. 225 Kan. at 44.

The exception to the general rule applies only where the affiant is a government agent and the defendant's challenge is supported by sworn allegations that false statements made knowingly, intentionally, or with reckless disregard for the truth were included in the affidavit, and the false or reckless statement is necessary to the finding of probable cause. If the exception applies, then the defendant is entitled to a *Franks* hearing.

There is no contention in the present case that Kiehl was acting as an agent of the government when he visited Jensen's house. However, it is Jensen's theory that Kiehl was the affiant pursuant to K.S.A. 22-2502(a), which does not requires affidavits supporting search warrant applications to be made by law enforcement officers. When Kiehl was called by the county attorney to testify before the magistrate, Jensen contends, he was an instrument of the government acting under the authority and direction of the State rather than independently. We do not agree.

Examination of the record discloses that the affiant actually was a law enforcement officer. The affidavit and

application for search warrant form bears the signature of and identifies "Jim Braun, Hays P.D.," as the affiant. In the space for a recitation of facts on which the application is based appears the note "(oral affidavit)." The transcript of the sworn testimony begins:

> "THE COURT: This is a hearing in Ellis County District Court in regard to an oral affidavit and application for search warrant. Detective Jim Braun will now take the oath. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?
>
> "DETECTIVE JIM BRAUN: I do.
>
> "THE COURT: You may examine.
>
> "MR. GLENN BRAUN [county attorney]: The first witness I am going to call, Your Honor, would be Robert Kiehl."

It ends with the judge asking, "Jim, do you want to sign this thing?" The "oral affidavit" took the form of Detective Braun's being sworn in and two witnesses, Kiehl and Deputy Zellmer, answering questions asked by the county attorney. The application in this case is not a typical written application supported by information provided by a confidential informant where reliability has been vouched for by the law enforcement affiant. Here, the officers did not verify Kiehl's veracity or reliability. Instead, the officers suggested the lack of such verification and left it to the judge to determine. K.S.A. 22-2502(b) authorizes the magistrate to require precisely the procedure which was followed in the present case on the initiative of the police:

> "Before ruling on a request for a search warrant, the magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses that the affiant may produce. Such proceeding shall be taken down by a certified shorthand reporter or recording equipment and made part of the application for a search warrant."

The district court credited law enforcement officers with applying for the warrant in the manner in which they did for the purpose of providing to the warrant-issuing judge all available means of satisfying himself of Kiehl's reliability. The district court stated:

> "The officers then, knowing that they had no previous knowledge of Kiehl and only a limited amount of corroboration for his story, took Kiehl before the issuing magistrate. The officers could not have done more. They put before Judge Scott everything they had, including their witness. . . .
>
> . . . .
>
> "Since the Court has found that the officers, in applying for the search warrant, and using Kiehl's testimony in support of the application, did nothing improper, the actions of the officers cannot give rise to a successful challenge to the testimony upon which the search warrant was based."

In this case, Kiehl's reliability was an unknown quantity to police, who avoided the issue by making no representations about it and having Kiehl testify before the

magistrate. The magistrate could and should have questioned Kiehl and the officers in order to satisfy the intertwined requirement of the informant's reliability. Here, however, the issuing judge ignored the opportunity to elicit information on which an opinion of the informant's reliability could have been based. The few minutes in which Kiehl appeared to testify may have permitted the judge to form an initial impression of the informant as credible or not, but an impression based on appearance and demeanor cannot replace an opinion formed on facts. That failure lies with the issuing magistrate and not with the law enforcement officers. The district court correctly interpreted the *Franks* exception and did not err in denying a hearing.

We next consider the issue common to both cases: Does assessment and partial or complete satisfaction of tax and penalty under the Kansas Drug Tax Act bar subsequent criminal prosecution on a charge arising from possessing the drug? In 1994, the United States Supreme Court decided in *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994), that Montana's drug tax was invalid under the Double Jeopardy Clause of the Fifth Amendment to the federal Constitution. Motions to dismiss charges were filed by defense counsel in the present cases based on application of the *Kurth Ranch* holding. In its memorandum opinion, the district court stated the double jeopardy issue raised by Jensen and Simpson as follows: "Does the Kansas drug tax, like that of Montana, constitute punishment and therefore prohibit a second punishment of the defendant through these criminal proceedings?" The district court concluded that the Kansas tax was punitive in nature.

Accordingly, it granted the motions to dismiss one count against each defendant.

The complaint against Jensen charged him in Count I with possessing marijuana with intent to sell within 1,000 feet of school property and in Count II with possessing marijuana without paying the tax imposed pursuant to K.S.A. 1995 Supp. 79-5202. The district court dismissed Count I. The district court left untouched the charge of possessing marijuana without paying the tax.

The complaint against Simpson charged him in Count I with possessing marijuana without paying the tax imposed pursuant to K.S.A. 1995 Supp. 79-5202 and in Count II with possessing marijuana with intent to sell. The district court dismissed Count II. The State already dismissed Count I.

After the district court granted Jensen's and Simpson's motions to dismiss, this court issued its opinion in *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995). In that case, based on *Kurth Ranch*, the district court dismissed a complaint against Barbara Gulledge charging her with possession of marijuana and possession of marijuana without a tax stamp. The State appealed. This court reversed the judgment and remanded for further proceedings. 257 Kan. at 931.

In *Gulledge*, the court gave the following brief overview of double jeopardy jurisprudence:

> "In *State v. Cady*, 254 Kan. 393, 867 P.2d 270 (1994), we described the effect and application of the Double Jeopardy Clause as follows:
>
> 'The Double Jeopardy Clause of the United States Constitution protects against (1) a second

> prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) *multiple punishments for the same offense. Brown v. Ohio,* 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). The language of § 10 of the Kansas Constitution Bill of Rights is very similar to the language contained in the Fifth Amendment to the United States Constitution. Both provide in effect that no person shall be twice placed in jeopardy for the same offense. The language of the Fifth Amendment guarantees no greater protection to an accused than does § 10 of the Kansas Constitution Bill of Rights. Therefore, the underlying protection contained in the Double Jeopardy Clause of the United States Constitution is contained in § 10 of the Kansas Constitution Bill of Rights.' 254 Kan. at 396-97." (Emphasis added.) 257 Kan. at 920.

This court stated the issue in *Gulledge* as: "Does assessment and payment of amounts allegedly owed under the Kansas Drug Tax Act (Act) constitute a criminal punishment for double jeopardy purposes under the holding in [*Kurth Ranch*]?" 257 Kan at 916-17. The court concluded that it did not. It reasoned that the Supreme Court relied upon two unusual features of the Montana drug tax scheme in finding a double jeopardy violation and that a statutory scheme, like the Kansas Act, without the unusual features would pass muster.

The issue in the present case, as in *Gulledge,* is whether defendants face multiple punishments for the same offense, but Jensen and Simpson argue that *Gulledge* was wrongly decided. We do not agree and conclude that *Gulledge* is controlling.

In addition to arguing that *Gulledge* was wrongly decided, Jensen and Simpson argue that there is an important aspect of Kansas' drug taxing scheme which was not examined in that case. That aspect is the 100 percent penalty which was assessed against each of them. The penalties for violation of the Act are set out in K.S.A. 1995 Supp. 79-5208:

> "Any dealer violating this act is subject to a penalty of 100% of the tax in addition to the tax imposed by K.S.A. 79-5202 and amendments thereto. In addition to the tax penalty imposed, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels or other indicia is guilty of a severity level 10 felony."

It is the contention of Jensen and Simpson that the 100 percent penalty is "a sanction clearly imposed to punish one who illegally possesses a controlled substance." As a sanction rather than a tax, the contention continues, it is subject to the test set out in *United States v. Halper,* 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), rather than to the *Kurth Ranch* tax analysis.

Irwin Halper managed a medical services laboratory. He was convicted on 65 counts of violating the criminal false claims statute for submitting false Medicare claims for reimbursement for services rendered. He was fined $5,000 and sentenced to prison. In a subsequent civil suit under the False Claims Act, the government was granted summary judgment on the issue of liability on the basis of the convictions. The statute authorized a sanction of $2,000 plus double damages for each violation. The

United States Supreme Court concluded that the statutory penalty constituted a second punishment for the same conduct and that it was not rationally related to the goal of making the government whole. 490 U.S. at 451. The Court stated its holding as follows:

> "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-49.

In *State v. Mertz*, 258 Kan. 745, 907 P.2d 847 (1995), we considered whether a prosecution for DUI, following a defendant's driver's license revocation, constituted multiple punishment and thus violated the Double Jeopardy Clause of the United States and Kansas Constitutions. We found it did not. As to *Kurth Ranch* and *Halper*, we said:

> "The defendant's reliance on *Kurth Ranch* is misplaced for two reasons. First, contrary to the defendant's position, *Kurth Ranch* seems to interpret *Halper* as promulgating a restrictive, rather than expansive, definition of punishment. In analyzing *Halper*, the Court quoted the clause of *Halper* that states a civil sanction is punishment if the sanction ' "may not fairly be characterized as remedial, but only as a deterrent or retribution." ' 128 L. Ed. 2d at 777. Thus, *Kurth Ranch* follows the interpretation that if a sanction has a remedial purpose at all, then it is not punishment. Consistent with this interpretation, *Kurth Ranch* states later in the opinion that 'neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a

> form of punishment.' 128 L. Ed. 2d at 779. The second reason the defendant's reliance on *Kurth Ranch* is invalid is that the Court specifically found *Halper's* definition of punishment did not apply to the tax statute at issue in *Kurth Ranch*. In *Kurth Ranch*, the tax was found to be punishment not because of the *Halper* punitive purpose rule but because of several unusual features of the tax statute. Thus, *Kurth Ranch* does not apply to the situation at hand." 258 Kan. at 754-55.

We then concluded:

> "We hold the suspension sanction in this case serves a purpose which is solely remedial, in that the sanction's purpose is to protect the public. The suspension sanction quickly removes dangerous drivers from the street to prevent them from injuring anyone. Any harmful effect which the sanction may have on the driver simply indicates that the sanction may appear to be punitive from the driver's perspective. Such harmful effects do not necessarily indicate that the sanction carries purposes of punishment such as deterrence and retribution. While certainly the sanction *may* be interpreted as having punitive effects, this does not mean the sanction *must* be interpreted as having punitive effects. [*United States v.*] *Hudson*, 14 F.3d [536,] at 540 [(10 Cir. 1994)]. Thus, the sanction does not serve the purpose of punishment. Rather, it protects the public safety as a solely remedial sanction. Moreover, following *Halper's* suggestion as to what factors might make a sanction remedial, the suspension of a driver's license seems proportionate to driving with a .08

> or greater blood alcohol concentration." 258 Kan. at 760.

In *In the Matter of C.M.J.* (No. 74,889, this day decided), we considered whether the expulsion of a student from high school precluded adjudication of a student as a juvenile delinquent based upon the same conduct. The district court determined that it was a violation of the double jeopardy protections. The State appealed, and we reversed the trial court. C.M.J. relied on *Halper* in arguing that the juvenile prosecution subjected C.M.J. to multiple punishments. We disagreed, stating:

> "Although we said in *Mertz*, 258 Kan. 745, Syl. ¶ 5, that '[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment,' nevertheless, a civil sanction will rarely qualify as punishment for double jeopardy purposes. We recognized this in *Mertz* when we said:
>
> 'The rules announced in *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), concerning the issue of whether a civil sanction constitutes punishment so as to prohibit a criminal prosecution for the same offense are rules for the rare case.' 258 Kan. 745, Syl. ¶ 7.
>
> . . . .
>
> "Furthermore, a sanction is deemed to have a remedial purpose if it protects the public from harm. Even though it may appear to have punitive effects and might be interpreted as punishment, if it also can support a construction as

remedial, it will not form the basis for a challenge on the grounds of double jeopardy. See *Mertz*, 258 Kan. 745, Syl. ¶¶ 8, 10.

"In short, a civil sanction may invoke double jeopardy protections as a form of 'punishment' only if it is grossly disproportional to legitimate State goals separate from those served by criminal prosecution. See *Kurth Ranch*, 128 L. Ed. 2d at 779, 781; *Halper*, 490 U.S. at 452. neither the severity of the sanction nor the fact that it has a deterrent purpose automatically establishes that it is a form of punishment. See *Kurth Ranch*, 128 L. Ed. 2d at 779. Nor does the fact that the sanction has a punitive component invoke double jeopardy protection where the government's remedial interests are tightly intertwined with its punitive interests. See *U.S. v. Hernandez-Fundora*, 49 F.3d 848, 852 (2d Cir. 1995) (remedial interest of maintaining order in a prison setting permits sanctions with punitive component, without being punishment for double jeopardy purposes). '[T]he fact that remedial concerns require "punishing" individuals for violent or other disruptive conduct [in an institutional setting] does not mean that the sanctions imposed constitute "punishment" for double jeopardy purposes.' *Hernandez-Fundora*, 49 F.3d at 852."

Jensen and Simpson note that this court determined that the primary purpose of the Kansas Act is deterrent. See 257 Kan. at 923. They contend that the primary purpose of the penalty cannot be said to be remedial if that of the tax is deterrent.

The State argues that the same analysis should apply to both tax and penalty because the 100 percent penalty

does nothing more than "increase the amount of the tax burden." In *Kurth Ranch,* the Supreme Court stated that it would be inappropriate to subject Montana's drug tax to the *Halper* test. 128 L. Ed. 2d at 781. The Court reasoned:

> "In *Halper,* we recognized that a civil penalty may be imposed as a remedy for actual costs to the State that are attributable to the defendant's conduct. 490 U.S. at 452, 104 L. Ed. 2d 487, 109 S. Ct. 1892. Yet as The Chief Justice points out, tax statutes serve a purpose quite different from civil penalties, and *Halper's* method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute. [Citation omitted.]' " 128 L. Ed. 2d at 781.

Thus, under the State's analysis, the *Kurth Ranch* test rather than the *Halper* test should be applied to the 100 percent penalty as well as to the tax.

For a slightly different reason, KDR agrees with the State that the *Kurth Ranch* test is appropriately applied to the penalty. KDR suggests that it would be illogical, where the tax has been determined not to violate the Double Jeopardy Clause, if the penalty for failing to pay the tax were not likewise determined to be unobjectionable. The suggestion has merit.

The State makes the additional argument that the 100 percent penalty is imposed for failure to pay the drug tax rather than for possessing the drug. We agree. The express language of 79-5208 supports the understanding that what is being penalized is the failure to pay the drug tax. The question for this double jeopardy challenge is whether there were multiple punishments for the same

offense. Since the 100 percent penalty is exacted for failing to pay the drug tax rather than for possessing the drug, Jensen and Simpson were not punished more than once for failing to pay the drug tax. What makes this point significant is that the charge the district court *dismissed* against Jensen was possession of marijuana with intent to sell within 1,000 feet of a school and, against Simpson, was possession of marijuana with intent to sell. Thus, the charges which were dismissed as carrying duplicative punishments would not have punished the same offense as the 100 percent penalty. The 100 percent penalty is punishment for the offense of failing to pay the drug tax, and the punishment for the dismissed charges would have been for possessing the drug. Because the punishments are not for the same offense, the Double Jeopardy Clause is not implicated.

We conclude that our rationale in *Gulledge* is controlling as to the 100 percent penalty. The basis for our decision was that the features which rendered the Montana drug tax law unconstitutional did not exist in the Kansas drug tax statute. The same analysis applies to the penalty provision.

The district court erred in holding that prosecution on the possession of marijuana charges was precluded as a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Jensen's conviction of possession of marijuana without paying the drug tax is affirmed. The district court's dismissal of the possession of marijuana charges against Jensen and Simpson is reversed, and the cases are

remanded with directions to reinstate the charges against both defendants.

IN THE DISTRICT COURT
OF ELLIS COUNTY, KANSAS

STATE OF KANSAS, **Plaintiff,**

vs. **Case No. 94CR-184**

HOWARD SCOTT SIMPSON, **Defendant.**

MEMORANDUM OF DECISION

NOW ON THIS 9th day of January 1995, this matter comes on before the court on the motion of the defendant to dismiss the complaint in this case for the reason that this prosecution constitutes double jeopardy. The State of Kansas appears by Glenn R. Braun, Ellis County Attorney. Defendant appears in person and by his attorney, Michael Holland of Russell, Kansas.

The facts of the present case are as follows:

On May 2, 1994, the defendant was stopped by officers of the Hays Police Department for operating a vehicle with an expired license tag. While at the scene of the stop, officers looked through the window of the defendant's pickup and, with the aid of a flashlight, saw a large bag of what appeared to be marijuana. Defendant was arrested and charged with three counts of violation of the law: Count I, possession of marijuana upon which a tax is imposed without a stamp illegible proving payment of the tax in violation of K.S.A. 79-5204 and 5208; Count II possession of marijuana with intent to sell in violation of K.S.A. 65-4127b as amended; and Count III, driving and unregistered vehicle in violation of K.S.A. 8-142.

On May 16, 1994, The Kansas Department of Revenue, Division of Taxation issued a Notice of Assessment of Tax Upon Marijuana and a Controlled Substance. The Notice states that the KDR has levied a tax upon the marijuana seized of $7,840.00, based upon the statutory tax rate of $3.50 per gram or portion thereof. In addition, the Department assessed a 100% penalty. The total tax due as stated in the Notice is $15,680.00, and a tax warrant was issued for that amount. The tax warrant is also dated May 16, 1994. The parties have stipulated that a motorcycle belonging to the defendant has been seized by KDR under the tax warrant, in partial satisfaction of the tax and penalty due.

Defendant contends in this criminal case that the marijuana tax and penalty assessed against him, and in part collected by virtue of the levy upon his motorcycle was a punishment imposed upon him for the same criminal acts for which he is charged in this case, and that, therefore, prosecution in this case places him in jeopardy of a second punishment, prohibited by the Double Jeopardy Clause.

Defendant's motion is primarily based upon the case of *Department of Revenue of Montana v. Kurth Ranch, et al.*, 114 S.Ct. 1937 (1994). In that case, members of the Kurth family operated a farm and livestock ranch in Montana. Montana law enforcement officials raided the farm and discovered large quantities of marijuana. Six members of the Kurth family were charged with conspiracy to possess drugs or, alternatively, possession of the drugs with intent to sell. Each eventually entered a plea pursuant to a plea agreement. One defendant was found guilty of possession, and the other five of the conspiracy charge.

A civil forfeiture action was also filed against items of the Kurths' property, and that action was later settled with the defendants agreeing to forfeit a sum of cash and items of equipment. The Kurths' case represented the first application of the Montana tax on dangerous drugs. The Montana Department of Revenue attempted to assess almost $900,000 in dangerous drug taxes.

Finally, the Kurths filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. In the bankruptcy proceeding, the Kurths objected to the proof of claim filed by the Montana DOR to secure payment of the drug tax, challenging the claim on double jeopardy grounds.

The bankruptcy court first held that the proper amount of the tax assessment authorized under Montana law was in the amount of $181,000 on 1,811 ounces of harvested marijuana. The bankruptcy court then determined, however, that assessment of the drug tax constituted a form of double jeopardy and thus could not be collected. The District Court and 9th Circuit Court of Appeals each affirmed the bankruptcy court.

While the *Kurth* case was making its way though the appellate process, the Supreme Court of Montana, reversing two lower court decisions, held that the Montana tax on dangerous drugs did not constitute double jeopardy. Because of this direct conflict between the Montana Supreme Court ruling and the *Kurth* ruling in the federal system, the United States Supreme Court granted certiorari. In an opinion commanding a majority of five Justices, the United States Supreme Court affirmed the decision of the Federal District Court and held that the

assessment of the drug tax punished the Kurths a second time for the same acts, thus violating the prohibition against double jeopardy.

The present case presents this Court with the same double jeopardy question but in a reversed procedural order. Here, the tax has been assessed and partially collected, but the criminal punishment has not yet been imposed. Does the Kansas drug tax, like that of Montana, constitute punishment and therefore prohibit a second punishment of the defendant through these criminal proceedings?

Kansas, pursuant to K.S.A. 79-5201 et seq. has adopted its own tax on illegal drugs. In considering the Kansas drug tax act in the current context, it is necessary to more fully discuss the majority opinion in the *Kurth* case.

The *Kurth* Court first discusses the earlier decision in *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), in which a civil penalty was held to constitute punishment for purposes of double jeopardy analysis. The *Kurth* court differentiates a civil penalty and a tax by stating: "Our answer to that question does not decide the different question whether Montana's tax should be characterized as punishment." 114 S.Ct. at 1944. *Halper* was, however, important in that:

> " . . . *Halper's* unequivocal statement that labels do not control in a double jeopardy inquiry, indicates that a tax is not immune from double

jeopardy scrutiny simply because it is a tax." 114 S.Ct. at 1946.

The *Kurth* opinion recognizes that:

" . . . neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment. In this case, although those factors are not dispositive, they are at least consistent with a punitive character. A significant part of the assessment was more than eight times the drug's market value – a remarkably high tax. That the Montana legislature intended the tax to deter people from possessing marijuana is beyond question" 114 S.Ct. at 1946.

This Court concludes that the tax assessed by Kansas against Jensen is also a "remarkably high tax," as the parties have stipulated that the Kansas tax rate is almost exactly equivalent to that of Montana, and further that the marijuana seized from defendant had a market value equivalent with that which was considered in *Kurth.* In addition to the high rate it should be noted that the Kansas tax is reimposed upon the same substance every three months. K.S.A. 79-5204(b).

The deterrent purpose of the Kansas tax cannot be denied as the factors present in *Kurth* are also present here. Further, the Kansas Supreme Court in *State of Durrant,* 244 Kan. 522, 526, 769 P.2d 1174, cert. denied ___ U.S. ___, 106 L.Ed.2d 600 (1989) found in the legislative history that "the . . . primary purpose of the act (Kansas drug tax act) was to combat drug usage . . . " 244 Kan. at 638.

The *Kurth* Court went on to identify other "unusual features" of the Montana tax as compared to other taxes:

> "Other unusual features, however, set the Montana statute apart from most taxes. First, this so-called tax is conditioned on the commission of a crime. That condition is significant of penal and prohibitory intent rather than the gathering of revenue. Moreover, the Court has relied on the absence of such a condition to support its conclusion that a particular federal tax was a civil rather than a criminal sanction. In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax."

> "Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits – such as creating employment, satisfying consumer demand, and providing tax revenues – are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish

when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction."

"The Montana tax is exceptional for an additional reason. Although it purports to be a species of property tax – that is, a tax on the possession and storage of dangerous drugs, Mont. Code Ann. 15-25-111 (1987) – it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed. Indeed, the State presumably destroyed the contraband goods in this case before the tax on them was assessed. If a statute that amounts to a confiscation of property is unconstitutional, *Heiner v. Donnan*, 285 U. S. 312, 326 (1932); *Nichols v. Coolidge*, 274 U. S. 531, 542 (1927), a tax on previously confiscated goods is at least questionable. A tax on possession of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment."

"Taken as a whole, this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." 114 S.Ct. at 1947-1948.

The State in this case attempts to differentiate the Kansas tax from the Montana tax. It first argues that a $100.00 per ounce marijuana tax was approved by the United States Supreme Court in *United States v. Sanchez*,

340 U.S. 42, 71 S.Ct. 108 (1950). The *Kurth* Court addresses this assertion, differentiating the federal marijuana tax considered in *Sanchez* from the Montana tax because the federal tax did not rest on criminal conduct, and could therefore be properly characterized as civil and not criminal. 114 S.Ct. fn. 20. As shown below the Kansas tax rests exclusively on criminal conduct.

The Montana tax is exacted only after arrest, whereas the Kansas tax is imposed from the moment of possession. The prosecution claims that this differentiates the punitive character of the Montana tax from the civil character of the Kansas tax. While it is true that the Montana tax appears to be imposed only after arrest and that the entire class subject to the Montana tax consists, therefore, of those arrested for possessing marijuana, the language from *Kurth* quoted above reveals that it is the fact that "this so-called tax is conditioned on the commission of a crime" which renders the tax " 'significant of penal and prohibitory intent rather than the gathering of revenue.' "

It cannot be questioned that the Kansas tax is conditioned upon the commission of a crime. K.S.A. 79-5201, which contains the definition of terms applicable to the Kansas drug tax act states:

> "79-5201. Taxation of marijuana and controlled substances; definitions. As used in this act:
>
> (a) 'Marijuana' means any marijuana, whether real or counterfeit, as defined by subsection (o) of K.S.A. 65-4101, and amendments thereto, which is held, possessed, transported, transferred, sold or offered to be sold **in violation of the laws of Kansas**;

(b) 'controlled substance' means any drug or substance, whether real or counterfeit, as defined by subsection (e) of K.S.A. 65-4101, and amendments thereto, which is held, possessed, transported, transferred, sold or offered to be sold **in violation of the laws of Kansas.** Such term shall not include marijuana;

(c) 'dealer' means any person who, **in violation of Kansas law,** manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than one gram of any controlled substance, or 10 or more dosage units of any controlled substance which is not sold by weight;

(d) 'domestic marijuana plant' means any cannabis plant at any level of growth which is harvested or tended, manicured, irrigated, fertilized or where there is other evidence that it has been treated in any other way in an effort to enhance growth."

(emphasis mine)

It is thus obvious that the sole class of taxpayers to which the Kansas tax applies comprises those who are in violation of the law.

The State argues that there is a legitimate revenue enhancement purpose to the Kansas tax, citing *State v. Berberich*, 248 Kan. 854, 811 P.2d 1192 (1991). However, the *Kurth* Court, in rejecting the argument that a tax with a

revenue enhancement purpose could not give rise to double jeopardy, stated

> "These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." 114 S.Ct. at 1947.

The State then asserts that the Kansas tax is distinguishable from the Montana tax because the Montana tax is a species of property tax, and the Kansas tax has been held to be an excise tax, citing *Berberich*. Thus, when the *Kurth* Court cites as an indicator of its punitive character the fact the Montana tax is a tax upon "goods that the taxpayer neither owns nor possesses when the tax is imposed" the same reasoning would not apply to the Kansas tax because, unlike the assessment procedure in that state, the Kansas tax is imposed upon taking of possession and not upon arrest. However, in the same section of the *Kurth* opinion, the Court states: "A tax on 'possession' of goods that no longer exist **and that the taxpayer never lawfully possessed** has an unmistakable punitive character."

In summary, the Kansas tax on marijuana is:

1. Extremely high;
2. obviously imposed for a deterrent and punitive reason;
3. conditioned upon the commission of a crime;
4. is levied upon goods which the taxpayer never legally possessed.

While the Montana tax is not imposed until arrest, and the Kansas tax is imposed upon possession, it is clear that the intent of both tax acts is to impose an enormous tax, and thus a punishment, upon strictly criminal activity. The fact that the Montana tax is imposed only upon arrest is evidence that it is strictly limited to criminal behavior, but it is the limited application of the tax to criminal behavior which is important, not the timing of the tax levy.

Likewise, it is the punitive nature of the tax which is important and not whether it is characterized as a property or an excise tax. It does not matter how the tax is classified because the true focus is on whether it is intended to punish, and that is revealed by the class of taxpayers to whom it applies. In *Sanchez,* the Court found that the tax could apply to non-criminal behavior, and was thus civil in nature. In *Kurth,* the tax was applicable only to criminal behavior, and thus could only be a criminal punishment. This is also the case with the Kansas tax.

Any justification of the Kansas tax as a revenue enhancement must give way to the reasoning in *Kurth* that such a purpose could as easily be served by a higher fine in the criminal case, or by imposition of the tax in the same proceeding. The Kansas tax is not identical with the Montana tax found to be punitive in *Kurth,* but in all respects relevant to this analysis the differences are meaningless. The punitive nature of the Kansas tax is apparent.

The Court therefore concludes that the charge of possession of marijuana with intent to sell must be dismissed because prosecution under that charge constitutes double jeopardy.

The prosecution has dismissed Count I of the complaint, and the defendant has plead guilty to Count III.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED, That the defendant's motion as to Count II of the complaint herein is sustained and Count II is dismissed as submitting the defendant to double jeopardy.

Dated: _____

/s/ Edward E. Bouker
Edward E. Bouker
District Judge

Copies: Glenn R. Braun
Michael Holland

EXHIBIT 2

STATE OF KANSAS

[SEAL]

Brett H. Robinson, Director
Robert B. Docking State Office Building
915 S.W. Harrison St. (913) 296-3044
Topeka, Kansas 66625-0001 FAX (913) 296-7928

Department of Revenue
Division of Taxation

May 13, 1994

HOWARD S. SIMPSON
#7 RICHARD ROAD Social Security #: 510-50-2253
HAYS, KS 67601

NOTICE OF ASSESSMENT OF TAX UPON MARIJUANA AND A CONTROLLED SUBSTANCE

Based upon information available to this office, you were found in possession of substances without the required drug stamps affixed, in violation of K.S.A. 79-5204. Pursuant to K.S.A. 79-5201 et seq., as amended, the Director of Taxation has made the following assessment of tax and penalty based upon said information:

Tax based upon $3.50 per gram, or portion thereof, of processed marijuana:	$7,840.00
Total Tax:	$7,840.00
Penalty pursuant to K.S.A. 79-5208:	$7,840.00
TOTAL AMOUNT DUE:	$15,680.00

If you feel that this assessment is incorrect, you must make written request for a hearing before the Director of Taxation. Such request must be filed in triplicate with the Drug Tax Administrator, Kansas Department of Revenue. Division of Alcoholic Beverage Control, 4 Townsite Plaza,

Suite 210, 200 S.E. 6th Street, Topeka, KS 66603-3512, within fifteen (15) days from the date of this assessment notice.

Failure to immediately pay this assessment may result in a tax warrant being issued to the Sheriff or other law enforcement officer directing he or she to seize and sell all of your property, real and personal, or any interest that you may have therein, sufficient to satisfy the amount stated above, plus any allowable interest and fees provided by law. you may contact the Drug Tax Administrator, Jason Crider, at (913) 296-3946, if you would like to discuss payment arrangements. The tax, penalty, interest and fees are due and payable immediately pursuant to K.S.A. 79-5205. Failure to make payment may also result to referral of the account to an out-of-state collection agency, where applicable, and the collection fees will be added to the balance above. To assure correct handling, attach a copy of this notice to your payment or request for hearing.

/s/ Jason Crider

Drug Tax Unit
For the Director of Taxation

EXHIBIT 4

Social Security #: 510-50-2253 Total Due: $15,680.00

TAX WARRANT

KANSAS DEPARTMENT OF REVENUE

THE STATE OF KANSAS TO THE SHERIFF OF ELLIS COUNTY OR ANY OTHER LAW ENFORCEMENT OFFICER OF THE STATE OF KANSAS, OR ANY EMPLOYEE OF THE KANSAS DEPARTMENT OF REVENUE, GREETINGS:

WHEREAS, pursuant to the provisions of the Kansas Statutes Annotated 79-5201 et seq., and amendments thereto, the Director of Taxation has determined that

HOWARD S. SIMPSON
#7 RICHARD ROAD
HAYS, KS 67601

currently owes delinquent taxes, interest, and penalties, which are now due and unpaid, even though demand therefore has been made, as follows:

Tax Type	Amount Due
Tax on marijuana and controlled substances pursuant to K.S.A. 79-5201 et seq., and amendments thereto:	$15,680.00

NOW, THEREFORE, under the authority vested by law in the Secretary of Revenue pursuant to K.S.A. 79-3235. YOU ARE HEREBY COMMANDED to levy upon the personal and real property of the above-named taxpayer which is found in your jurisdiction, sufficient to make payment of the amount due hereunder and any additional penalties, interest, fees provided by law, and costs of execution. Said property should be seized in the

following order: (1) intangible personal property, such as cash, securities and bank accounts; (2) tangible personal property; (3) real estate. Tangible personal property and real estate shall be sold as provided by law. No law exempting any goods, chattels, land or tenements from forced sales under execution shall apply to a levy and sale under this warrant.

YOU ARE FURTHER COMMANDED to file this warrant with the Clerk of the District Court in your county, within 5 days after you receive it, and within 60 days to make return hereof to the Kansas Department of Revenue showing the manner of execution.

IN WITNESS WHEREOF, my designee has set his hand and affixed the official seal of the Kansas Department of Revenue on May 16, 1994.

[SEAL]

/s/ Jason Crider
Jason Crider,
Dept of Revenue,
Topeka, KS
913-296-3946

RETURN

RECEIVED THIS WRIT, this _____ day of _____, 19_____, at _____ o'clock _____. M. On the _____ day of _____, 19_____, I levied on the property of said debtor as follows: _____ (attach list if more space needed).

Sheriff, other Law Enforcement Officer or Agent of the Kansas Department of Revenue

IN THE DISTRICT COURT OF ELLIS COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,

vs. No. 94CR-184

HOWARD SCOTT SIMPSON, Defendant.

JOURNAL ENTRY

NOW, on this 9th day of January, 1995, the above matter comes before the Court. The State appears by Glenn R. Braun, Ellis County Attorney. The defendant appears in person and by his attorney, Michael S. Holland.

WHEREUPON, based on the Court's statements from the bench, the State moves to dismiss Count One, without prejudice. The defendant enters a plea of guilty to Count Three.

THEREUPON, the Court grants the States' dismissal without prejudice on Count One and finds the defendant guilty of Count Three and sentences the defendant to pay a $10 fine and $45 court costs.

IT IS SO ORDERED.

HON. EDWARD E. BOUKER
District Judge

SUBMITTED BY:

GLENN R. BRAUN
Ellis County Attorney
P.O. Box 725
Hays, KS 67601

APPROVED BY:

MICHAEL S. HOLLAND
Attorney for defendant
P.O. Box 206
Russell, KS 67665

Article 52. – MARIJUANA AND CONTROLLED SUBSTANCES

79-5201. Taxation of marijuana and controlled substances; definitions. As used in this act:

(a) "Marijuana" means any marijuana, whether real or counterfeit, as defined by subsection (o) of K.S.A. 65-4101, and amendments thereto, which is held, possessed, transported, transferred, sold or offered to be sold in violation of the laws of Kansas;

(b) "Controlled substance" means any drug or substance, whether real or counterfeit, as defined by subsection (e) of K.S.A. 65-4101, and amendments thereto, which is held, possessed, transported, transferred sold or offered to be sold in violation of the laws of Kansas. Such term shall not include marijuana;

(c) "Dealer" means any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses more than 28 grams of marijuana, or more than one gram of any controlled substance, or 10 or more dosage units of any controlled substance which is not sold by weight.

History: L. 1987, ch. 366, § 1; July 1.

Attorney General's Opinions:

Controlled substances; dealer defined; forfeiture of conveyance. 88-29.

CASE ANNOTATIONS

1. Information obtained hereunder usable only for enforcement of act, act does not violate privilege against self-incrimination. State v. Durrant, 244 K. 522, 523, 535, 769 P.2d 1174 (1989).

79-5202. Same; imposition of tax; rates; measurement. (a) There is hereby imposed a tax upon marijuana and controlled substances, as defined by K.S.A. 1987 Supp. 79-5201, at the following rates:

(1) On each gram of marijuana, or each portion of a gram, $3.50; and

(2) on each gram of controlled substance, or portion of a gram, $200; or

(3) on each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, $2,000.

(b) For the purpose of calculating the tax hereunder, an ounce of marijuana or other controlled substance is measured by the weight of the substance in the dealer's possession. The weight of the marijuana or controlled substance includes all material, mixture or preparation that is added to the marijuana or controlled substance.

History: L. 1987, ch. 366, § 2; July 1.

CASE ANNOTATIONS

1. Constitutionality of act and uses of information obtained thereunder determined. State v. Durrant, 244 K. 522, 526, 769 P.2d 1174 (1989).

79-5203. Same; administration by director of taxation; tax payments; stamps and labels; rules and regulations. (a) The director of taxation shall administer this act. All tax payments required pursuant to this act shall be made to the director, and shall be accompanied by a return upon forms devised and furnished by the director.

(b) The director of taxation shall adopt a uniform system of providing, affixing and displaying official stamps, labels or other indicia for marijuana and controlled substances upon which a tax is imposed.

(c) The secretary of revenue shall adopt rules and regulations necessary to administer and enforce the provisions of this act.

History: L. 1987, ch. 366 § 3, July 1.

CASE ANNOTATIONS

1. Constitutionality of act and uses of information obtained thereunder determined. State v. Durrant, 244 K. 522, 526, 769 P.2d 1174 (1989).

79-5204. Same; evidence of payment required; purchase of stamps; validity; tax payable, when. (a) No dealer may possess any marijuana or controlled substance upon which a tax is imposed pursuant to K.S.A. 1987 Supp. 79-5202 unless the tax has been paid as evidenced by an official stamp or other indicia.

(b) Official stamps, labels or other indicia to be affixed to all marijuana or controlled substances shall be purchased from the director of taxation. The purchaser shall pay 100% of face value for each stamp, label or other indicia at the time of purchase. Each such stamp, label or

other indicia shall only be valid for three months after its date of issuance. The director shall issue the stamps, labels or other indicia in denominations in multiples of $10. Any person may purchase any such stamp, label or other indicia without disclosing such person's identity.

(c) When a dealer purchases, acquires, transports, or imports into this state marijuana or controlled substances on which a tax is imposed by K.S.A. 1987 Supp. 79-5202, and if the indicia evidencing the payment of the tax have not already been affixed, the dealer shall have them permanently affixed on the marijuana or controlled substance immediately after receiving the substance. Each stamp or other official indicia may be used only once.

(d) Taxes imposed upon marijuana or controlled substances by this act are due and payable immediately upon acquisition or possession in this state by a dealer.

History: L. 1987, ch. 366, § 4; July 1.

79-5205. Same; jeopardy assessments; collection of tax; notice to taxpayer; presumption that assessment valid. (a) An assessment for a dealer not possessing stamps or other official indicia showing that the tax has been paid shall be considered a jeopardy assessment. The director of taxation shall assess a tax based on personal knowledge or information available to the director of taxation; mail the taxpayer at the taxpayer's last known address or serve in person, a written notice of the amount of tax; demand its immediate payment; and, if payment is not immediately made, collect the tax and penalties in any manner provided in article 32 of chapter 79 of the Kansas Statutes Annotated.

(b) The taxpayer may, within 15 days from the date of mailing of the notice given pursuant to subsection (a), request in writing a hearing by the director on the correctness of the jeopardy assessment.

(c) The tax and penalties assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity. Any statement filed by the director of taxation with the court or any other certificate by the director of taxation of the amount of tax and penalties determined or assessed is admissible in evidence and is prima facie evidence of the facts it contains.

History: L. 1987, ch. 366, § 5; July 1.

79-5206. Same; report and return confidential. Neither the director of taxation nor a public employee may reveal facts contained in a report or return required by this act, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this act from the taxpayer making the return.

History: L. 1987, ch. 366, § 6; July 1.

CASE ANNOTATIONS

1. Legislature intended to extend use immunity and derivative use-immunity to persons complying with act. State v. Durrant, 244 K. 522, 534, 769 P.2d 1174 (1989).

79-5207. Same; examination of records by director; subpoenas. For the purpose of determining the correctness of any return, determining the amount of tax that should have been paid, determining whether or not the dealer should have made a return or paid taxes, or collecting any taxes under this act, the director of taxation may examine, or cause to be examined, any books, papers, records or memoranda, that may be relevant to making such determinations, whether the books, papers, records or memoranda, are the property of or in the possession of the dealer or another person. The director of taxation may require the attendance of any person having knowledge or information that may be relevant, compel the production of books, papers, records or memoranda by persons required to attend, take testimony on matters material to the determination, and administer oaths or affirmations. Upon demand of the director of taxation or any examiner or investigator, the court shall issue a subpoena for the attendance of the witness or the production of books, papers, records or memoranda. The director of taxation may also issue subpoenas. Disobedience of subpoenas issued under this act is punishable by the district court of the district in which the subpoena is issued, or, if the subpoena is issued by the director of taxation, by the district court of the district in which the party served with the subpoena is located, in the same manner as contempt of district court.

History: L. 1987, ch. 366, § 7; July 1.

CASE ANNOTATIONS

1. Constitutionality of act and uses of information obtained thereunder determined. State v. Durrant, 244 K. 522, 527, 769 P.2d 1174 (1989).

79-5208. Same; penalties for violation of act. Any dealer violating this act is subject to a penalty of 100% of the tax in addition to the tax imposed by K.S.A. 1987 Supp. 79-5202. In addition to the tax penalty imposed, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels or other indicia is guilty of a crime and, upon conviction, may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

History: L. 1987, ch. 366, § 8; July 1.

CASE ANNOTATIONS

1. Cited; search and seizure with warrant based on observations of state park custodian; private citizen not agent of state examined. State v. Smith, 243 K. 715, 717, 763 P.2d 632 (1988).

2. Constitutionality of act and uses of information obtained thereunder determined. State v. Durrant, 244 K. 522, 527, 769 P.2d 1174 (1989).

79-5209. Same; no immunity from criminal prosecution. Nothing in this act shall in any manner provide immunity for a dealer from criminal prosecution pursuant to Kansas law.

History: L. 1987, ch. 366, § 9; July 1.

79-5210. Same; certain persons not required to pay tax. Nothing in this act requires persons registered under article 16 of chapter 65 of the Kansas Statutes Annotated or otherwise lawfully in possession of marijuana or a controlled substance to pay the tax required under this act.

History: L. 1987, ch. 366, § 10; July 1.

CASE ANNOTATIONS

1. Constitutionality of act and uses of information obtained thereunder determined. State v. Durrant, 244 K. 522, 526, 769 P.2d 1174 (1989).

79-5211. Same; disposition of revenue. All moneys received from the collection of taxes imposed under the provisions of K.S.A. 79-5201 *et seq.*, and amendments thereto, and 50% of all moneys collected from assessments of delinquent taxes and penalties imposed thereunder, shall be remitted to the state treasurer who shall deposit the entire amount thereof in the state treasury and credit the same to the state general fund. The director of taxation shall remit 50% of all moneys received from the collection of assessments of delinquent taxes and penalties imposed pursuant to the provisions of K.S.A. 79-5201 *et seq.*, and amendments thereto, to the county treasurer of the county wherein the unstamped marijuana or controlled substance is found and seized. Upon receipt of any such remittance, the county treasurer shall deposit the entire amount thereof to the credit of the county general fund for use solely for law enforcement purposes.

History: L. 1989, ch. 287, § z; July 1.

Amendment 5. – CRIMINAL PROSECUTIONS; DUE PROCESS OF LAW; EMINENT DOMAIN

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE DISTRICT COURT
OF ELLIS COUNTY, KANSAS.

STATE OF KANSAS, Plaintiff,

VS. No. 94 CR 184

HOWARD SCOTT SIMPSON, a/k/a
H. SCOTT SIMSPON and
SCOTT SIMPSON, Defendant.

MOTION TO DISMISS

Comes now the defendant and in support of his motion to dismiss, states:

1. That on or about the 16th day of May, 1994, the Kansas Department of Revenue, Division of Alcoholic Beverage Control, assessed and levied a tax on the defendant pursuant to K.S.A. 1987 Supp. 79-5201 in the sum of $7,840.00 and imposed a penalty in the amount of $7,840.00 for a total tax and penalty of $15,680.00; that a copy of said assessment is attached hereto, marked Exhibit "A", and incorporated herein by reference thereto.

2. That on the 8th day of July, 1994, a warrant was issued and served by Jason Crider, Department of Revenue, Topeka, Kansas, and Dave Zellmer, Deputy Sheriff with the Ellis County Sheriff's Department, on said defendant, Howard S. Simpson, and as a consequence of said warrant, Howard S. Simpson's Harley Davidson Sportster Motorcycle was seized and taken by Jason Crider and Dave Zellmer allegedly under authority of said tax warrant issued by the Kansas Department of Revenue; that a copy of said tax warrant is attached hereto,

marked Exhibit "B" and incorporated herein by reference thereto.

3. That the imposition of the above-described tax constitutes a punishment for the identical offenses and/or acts which defendant is accused of committing in this entitled case which constitutes double jeopardy or punishment which is prohibited by the Fifth Amendment of the United States Constitution and Section Ten of the Bill of Rights of the Kansas Constitution.

WHEREFORE, the above-entitled case should be dismissed as same constitutes a violation of the jeopardy clause of the Fifth Amendment of the United States Constitution and Section Ten of the Bill of Rights of the Kansas Constitution.

Michael S. Holland #06207
Attorney at Law
P. O. Box 206
618 Main
Russell, Kansas 67665-0206
Phone 913-483-5332
Attorney for Defendant

CERTIFICATE OF SERVICE

I, Michael S. Holland, Attorney at Law, Russell, Kansas, do hereby certify that on this 10th day of August, 1994, I mailed a true and correct copy of the above and foregoing MOTION TO DISMISS, by depositing same in the United States mail, postage prepaid and properly addressed to:

Mr. Glenn R. Braun
Ellis County Attorney
P. O. Box 725
Hays, Kansas 67601

and forwarded the original to Mr. Phil Fielder Clerk, Ellis County District Court, P. O. Box 8, Hays, Kansas 67601, for filing.

Michael S. Holland #06207
Attorney at Law
P. O. Box 206
618 Main
Russell, Kansas 67665-0206
Phone 913-483-5332
Attorney for Defendant

No. 72,315

STATE OF KANSAS, *Appellant*, v. BARBARA GULLEDGE, *Appellee*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW – *Double Jeopardy – State and Federal Constitutional Protections.* The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights protect against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

2. TAXATION – *Drug Tax.* The Kansas drug tax imposed pursuant to the provisions of K.S.A. 79-5201 *et seq.* imposes a tax on the acquisition or possession by certain individuals of marijuana and controlled substances.

3. SAME – *Kansas Drug Tax Act – Not a Criminal Penalty.* The Kansas Drug Tax Act, K.S.A. 79-5201 *et seq.*, does not impose a criminal penalty for purposes of double jeopardy under the United States and Kansas Constitutions.

4. SAME – *Kansas Drug Tax Act – U.S. Supreme Court Case Inapplicable Concerning Double Jeopardy.* Due to substantial differences between the Montana and Kansasa drug tax statutes, *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994), is inapplicable, for double jeopardy purposes, to the Kansas Drug Tax Act.

Appeal from Ellsworth district court, HERB ROHLEDER, judge. Opinion filed June 2, 1995. Reversed and remanded.

Joe Shepack, county attorney, argued the cause, and *Robert T. Stephan*, attorney general, was with him on the brief, for appellant.

Reid T. Nelson, assistant appellate defender, argued the cause, and *Jessica R. Kunen*, chief appellate defender, was with him on the brief, for appellee.

Brian Cox, Legal Services Bureau, was on the brief for *amicus curiae* Kansas Department of Revenue.

The opinion of the court was delivered by

HOLMES, C.J.: The State of Kansas appeals from an order of the district court dismissing a complaint against Barbara Gulledge a/k/a Barbara Jones for possession of marijuana in violation of K.S.A. 1993 Supp. 65-4127b and possession of marijuana without a tax stamp in violation of K.S.A. 79-5201 *et seq.* Based on *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994), the district court found further prosecution of the complaint would constitute double jeopardy because a drug tax had already been assessed and partially satisfied. This court has jurisdiction pursuant to K.S.A. 1994 Supp. 22-3602(b)(1) (appeal to Supreme Court from order dismissing complaint).

For the purposes of this appeal, the parties have stipulated to the following facts:

> "1) That Barbara Gulledge was charged in the District Court of Ellsworth County, Kansas, on the 13th day of September, 1993, with the misdemeanor crime of possession of marihuana and the felony crime of possession of marihuana without a tax stamp affixed thereto, in violation of K.S.A. 65-4127b and K.S.A. 79-5201, *et seq.*, respectively.

"2) That these charges were still pending against the Defendant as of July 7, 1994.

"3) That subsequent to the filing of the aforesaid formal charges against the Defendant, the Kansas Department of Revenue did assess and levy a drug tax against the Defendant Barbara Gulledge. The basis for this assessment and levy was the quantity of marihuana, allegedly possessed by Gulledge which gave rise to the criminal charges in Ellsworth County District Court against Barbara Gulledge.

"4) That the officers arresting Gulledge seized from her person as of the date of the arrest the sum of $428.00. This said amount of money was delivered to the Kansas Department of Revenue prior to July 7, 1994, as per a drug tax warrant served upon Ellsworth County Law Enforcement officers by Kansas Department of Revenue Agent Bruce Stout.

"5) That the Kansas Department of Revenue did serve upon the Defendant Gulledge a copy of the drug tax warrant prior to July 7, 1994.

"6) That the seizure of the $428.00 by the Kansas Department of Revenue is final and, otherwise, non-appealable."

The docketing statement filed by the State asserts that the drug tax assessed against the defendant "was satisfied in full." The defendant filed a pretrial motion seeking dismissal of the criminal charges on the grounds that further prosecution after assessment and payment of the drug tax constituted double jeopardy under the

United States and Kansas Constitutions. Following argument, the trial court granted the motion based upon the holding of the Supreme Court in *Kurth Ranch.*

The issue now before us may be stated as: Does assessment and payment of amounts allegedly owed under the Kansas Drug Tax Act constitute a criminal punishment for double jeopardy purposes under the holding in *Montana Dept. of Rev. v. Kurth Ranch,* 511 U.S. ___, 128 L. Ed. 2d 767?

Before turning to the Supreme Court's decision in *Kurth Ranch* and the position of the parties to this appeal, the relevant provisions of the Kansas Drug Tax Act and our decisions interpreting the Act will be briefly reviewed.

The statutes imposing a tax on marijuana and controlled substances, commonly referred to as the Kansas Drug Tax Act (Act), were first adopted in 1987 and are codified at K.S.A. 79-5201 *et seq.* "Marijuana" is defined by reference to the appropriate subsections of K.S.A. 65-4101 and is included within the Act if possessed in violation of Kansas law. K.S.A. 1993 Supp. 79-5201(a). A "dealer" is any person who unlawfully acquires or possesses more than 28 grams of marijuana. K.S.A. 1993 Supp. 79-5201(c). K.S.A. 1993 Supp. 79-5202 imposes a tax on marijuana and other controlled substances and bases the rate of taxation on the weight of the substance in a dealer's possession. Marijuana is taxed at $3.50 per gram. K.S.A. 79-5203 provides for administration of the tax by the Director of Taxation and requires certain forms to be filled out at the time of payment of the tax.

K.S.A. 1993 Supp. 79-5204(a) prohibits a dealer from possessing marijuana unless the tax has been paid. Official stamps or labels are to be purchased from the Director of Taxation and affixed to the marijuana as evidence of payment. Each stamp is valid for three months after issuance. Any person may purchase the stamps without disclosing his or her identity. K.S.A. 1993 Supp. 79-5204(b). The tax is due immediately upon acquisition or possession of marijuana in the state. K.S.A. 1993 Supp. 79-5204(d). K.S.A. 1993 Supp. 79- 5205(a), applicable here, allows the Director to assess the tax immediately upon learning it has not been paid. If payment is not immediately made after notifying the dealer of the tax, penalty and interest due, the Director may collect the amount due as provided in the income tax statutes. The taxpayer has 15 days to request a hearing regarding the assessment. K.S.A. 1993 Supp. 79-5205(b). Information obtained in compliance with the Act is confidential and may not be used against the dealer in any criminal proceeding except proceedings involving taxes due under the Act. K.S.A. 79-5206.

K.S.A. 79-5208 establishes criminal and civil penalties. A dealer violating the Act is subject to a civil penalty of 100 percent of the tax in addition to payment of the tax itself. The Act makes distributing or possessing marijuana without affixing the appropriate stamps a crime, and upon conviction, the dealer may be sentenced to not more than five years imprisonment and/or payment of a fine not exceeding $10,000. The statute was amended in 1994 to provide that the crime is a severity level 10 felony. See K.S.A. 1994 Supp. 79-5208. The Act does not give a dealer immunity from criminal prosecution. K.S.A.

79-5209. Those legally possessing the drug, such as doctors, pharmacists, or hospitals, are exempted. K.S.A. 79-5210.

Although the instant case does not involve the constitutionality of the Act itself, three Kansas cases which have considered various constitutional attacks on the Act are instructive. The first case to consider the constitutional validity of the Act was *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, *cert. denied* 492 U.S. 923 (1989). In *Durrant*, the court held the Act does not violate the Fifth Amendment privilege against self-incrimination because all information obtained through compliance with the Act is confidential and may not be used as evidence in the prosecution for any crimes, other than enforcement of the Act itself. 244 Kan. at 535.

Next, the Court of Appeals in *State v. Matson*, 14 Kan. App. 2d 632, 798 P.2d 488 (1990), *rev. denied* 249 Kan. 777 (1991), considered a defendant's claim that the drug tax was really a criminal penalty and as such violated his Fourteenth Amendment right to due process. In *Matson*, the court relied heavily on *United States v. Sanchez*, 340 U.S. 42, 95 L. Ed. 47, 71 S. Ct. 108 (1950), where the United States Supreme Court upheld a federal statute (now repealed) that taxed the transfer of marijuana to a person who had not paid a special tax and registered. *Sanchez* recognized a tax may be valid even though it regulates, discourages, or deters the activity taxed. This principle applies even though the revenue obtained is negligible or the revenue purpose of the tax is secondary. 340 U.S. at 44.

After reviewing *Sanchez*, the court in *Matson* analyzed the legislative history of the Kansas Drug Tax Act:

> "Although the minutes of the Kansas House and Senate Committees show that the primary purpose of the Act was to combat drug usage, raising revenue was a motive that was definitely considered. The committee minutes reflect the following statement by Rep. Robert Miller: 'The taxes would provide a way to tax part of the flourishing underground economy that is normally operating on a tax-free basis.' Hearings on HB-2140 before the House Taxation Committee, 1987 Session. Other testimony before the committee reflects similar goals, including suggestions that the revenue collected be used not only to combat illegal drug usage but also for a program for the prevention, education, and rehabilitation of those adversely affected by the drug trade." 14 Kan. App. 2d at 640.

Matson upheld the constitutionality of the statute "[b]ecause revenue collection is one of the objectives of the statute and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana." 14 Kan. App. 2d at 640. The brief of *amicus curiae* Kansas Department of Revenue (KDR) states that over one-half million dollars in drug tax was collected in both fiscal year 1993 and fiscal year 1994. This court addressed an identical argument in *State v. Berberich*, 248 Kan. 854, 811 P.2d 1192 (1991). The court quoted heavily from *Matson* and relied on *Sanchez* in concluding the Kansas drug tax does not violate due process and is constitutionally valid. In relying on *Sanchez*, the court stated:

"In *United States v. Sanchez*, 340 U.S. 42, 95 L. Ed. 47, 71 S. Ct. 108 (1950), the United States Supreme Court held that the tax imposed by § 2590(a)(2) of the Internal Revenue Code (now repealed) of $100 per ounce on all transfers of marijuana to any person who has not paid the special tax and registered under §§ 2590 and 2591 of the Code was not invalid, despite the regulatory effect and the close resemblance to a penalty, merely because Congress, in enacting the tax statute, had the objective, in addition to raising revenue, to render extremely difficult the acquisition of the drug by persons who so desire for illicit uses and to develop adequate means of publicizing dealing in the drug in order to tax and control the traffic effectively. The civil character of the tax thus imposed is not altered by its severity in relation to the tax assessed. A tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed, even though the revenue obtained is obviously negligible or the revenue purpose of the tax is secondary. Even though the transferor becomes liable for a tax imposed upon the transfer of marijuana if the transferee fails to pay, the tax is a civil rather than a criminal sanction where the transfer is not made unlawful by the taxing statute, particularly where it provides a civil procedure for collection, thus indicating an intention of Congress that the tax be treated as such, and the Government seeks to collect the levy by a judicial proceeding with its attendant safeguards." 248 Kan. at 866.

As indicated earlier, the defendant does not assert that the Act is unconstitutional on its face but contends

that assessment and collection of the tax constitutes punishment which precludes, as a violation of the Double Jeopardy Clause, her criminal prosecution. The Kansas appellate courts have not specifically addressed whether assessment of the drug tax constitutes punishment for purposes of the Double Jeopardy Clause. The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969).

In *State v. Cady*, 254 Kan. 393, 867 P.2d 270 (1994), we described the effect and application of the Double Jeopardy Clause as follows:

> "The Double Jeopardy Clause of the United States Constitution protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). The language of § 10 of the Kansas Constitution Bill of Rights is very similar to the language contained in the Fifth Amendment to the United States Constitution. Both provide in effect that no person shall be twice placed in jeopardy for the same offense. The language of the Fifth Amendment guarantees no greater protection to an accused than does § 10 of the Kansas Constitution Bill of Rights. Therefore, the underlying protection contained in the Double Jeopardy

Clause of the United States Constitution is contained in § 10 of the Kansas Constitution Bill of Rights." 254 Kan. at 396-97.

We now turn to the issue before us. Did the assessment and collection of the Kansas drug tax constitute a criminal punishment which bars any further prosecution of the defendant as a violation of the Double Jeopardy Clause? The trial court held that it did, basing its determination on the decision in *Kurth Ranch*.

The United States Supreme Court in *Kurth Ranch* held that a tax on the possession of illegal drugs assessed after the State had imposed a criminal penalty for the same conduct constituted a second punishment in violation of the Double Jeopardy Clause. *Kurth Ranch* considered the effect and application of the Montana Dangerous Drug Tax Act, which imposed a tax on the "possession and storage of dangerous drugs." The taxpayer was required to file a return within 72 hours of arrest. There was no obligation to file a return or pay any tax unless and until a taxpayer was arrested. The tax was to be collected only after any state or federal fines or forfeitures had been satisfied. The tax rate was either 10 percent of the drug's assessed market value or a specified amount per ounce ($100 per ounce for marijuana), whichever was greater. Tax proceeds were to be allocated between substance abuse programs and enforcement of drug laws. 128 L. Ed. 2d at 773-74.

Under the facts of *Kurth Ranch*, a Montana district court convicted and sentenced six members of the Kurth family for drug crimes arising out of their operation of a marijuana farm. In a separate proceeding, the Montana Department of Revenue attempted to collect a tax on the

marijuana. The defendants challenged the constitutionality of the assessment, and the lower courts found the assessment invalid under the Double Jeopardy Clause. In determining whether the assessment was subject to the constraints of the Double Jeopardy Clause, the United States Supreme Court analyzed whether the tax should be characterized as a punishment.

Initially, the Court recognized that while the unlawfulness of an activity does not prevent its taxation, " 'there comes a time . . . [when a] so-called tax . . . loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.' " 128 L. Ed. 2d at 778 (quoting *A. Magnamo Co. v. Hamilton*, 292 U.S. 40, 44, 78 L. Ed. 1109, 54 S. Ct. 599 [1934]). Next, the Court noted that "neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment," although those factors were consistent with a characterization of the tax as punishment. 128 L. Ed. 2d at 779. The Court found the Montana tax was remarkably high, as a significant part of the assessment was more than eight times the drug's market value. Additionally, the Court found the deterrent purpose of the tax was beyond question. However, the Court then focused on two "unusual features" of the Montana tax which set it apart from most taxes and which the Court relied upon in holding the tax violated the Double Jeopardy Clause.

First, the tax was conditioned upon the commission of a crime. The Court recognized that in *Sanchez* it had "relied on the absence of such a condition to support its conclusion that a particular federal tax was a civil rather than a criminal sanction." 128 L. Ed. 2d at 780. The Court described the Montana tax:

> "[T]he tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax." 128 L. Ed. 2d at 780.

The Court explained that taxes imposed on illegal activities are different from taxes with pure revenue raising purposes or mixed-motive taxes which are intended to deter an activity and raise money. The justifications for mixed- motive taxes do not apply to taxes based solely on illegal activity because revenue could as easily be raised by increasing the fine imposed upon conviction. 128 L. Ed. 2d at 780.

The second unusual feature of the Montana tax was that, although it was purportedly a property tax on "the possession and storage of dangerous drugs," it was levied on goods the taxpayer neither owned nor possessed when imposed. 128 L. Ed. 2d at 781. Because the tax was not assessed until and unless a taxpayer was arrested, the drugs presumably were already destroyed or no longer possessed by the taxpayer when the tax was imposed. The Court found this kind of tax "imposed on criminals and no others" departed so far from normal revenue laws as to become a form of punishment. 128 L. Ed. 2d at 781. The Court concluded: "Taken as a whole, this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." 128 L. Ed. 2d at 781.

Because the tax was a punishment and imposed in a separate proceeding, the Court held it placed the defendants in double jeopardy. The Court concluded the tax must be imposed during the first prosecution or not at all. 128 L. Ed. 2d at 781-82. It stated: "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction." 128 L. Ed. 2d at 778. The Court, however, reserved the question "whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." 128 L. Ed. 2d at 780 n. 21. Likewise, in view of the result hereinafter reached, we do not need to consider that question. For a critical analysis of *Kurth Ranch*, see The Supreme Court – Leading Cases, 108 Harv. L. Rev. 139, 171 (1994).

The question for this court is whether the Kansas drug tax has such punitive characteristics that it is subjected to the constraints of the Double Jeopardy Clause. Like the Montana tax, the Kansas tax has a primarily deterrent purpose and the Kansas tax rate of approximately $100 per ounce is comparable to the Montana rate, which was more than eight times the market value of a significant portion of the drugs. 128 L. Ed. 2d at 779 n. 17. It should also be noted that the tax upheld in *Sanchez* was $100 per ounce. Additionally, as *amicus curiae* points out, there is no evidence in this case regarding the relationship of the assessment to the market value of the marijuana or any other benchmark. The market value can vary depending on a number of factors, such as quality, supply

and demand, and volume sold. In *Kurth Ranch*, Chief Justice Rehnquist notes in his dissent that the majority focuses on the value of the low-grade "shake" and "glosses over" the fact that the tax imposed on the higher-quality "bud" amounted to only 80 percent of its market value. 128 L. Ed. 2d at 785-86. In the present case there is simply no evidence on this point. The defendant also argues the tax rate is high because the tax stamps are valid for only three months. Presumably, the short life span of the tax stamps reflects the legislature's recognition of the rapid turnover rate of illicit drugs. Nevertheless, assuming that the rate is high, the facts of "a high tax rate and deterrent purpose . . . in and of themselves, do not necessarily render the tax punitive." 128 L. Ed. 2d at 779.

In *Kurth Ranch*, the Court, in finding a double jeopardy violation, relied upon certain unusual features of the Montana drug tax statutes which set them apart from most tax statutes. Absent these unusual features the Court, apparently, would not have found the Montana tax violated the Double Jeopardy Clause.

The initial "unusual feature" of the Montana tax was that it was conditioned on the commission of a crime. Although the Kansas drug tax applies only to those who unlawfully possess more than minimum quantities of marijuana or other controlled substances, unlike the Montana tax, assessment of the Kansas tax does not directly rest on criminal conduct. First, the tax does not apply to everyone who illegally possesses drugs. It only applies to those possessing illegal drugs in larger quantities in response to legislative concern that this flourishing underground economy not operate on a tax-free basis. In

Matson, the defendant contended the Kansas tax was "in reality a criminal penalty, and as such . . . an unconstitutional denial of due process under the Fourteenth Amendment." 14 Kan. App. 2d at 637. After recognizing that the primary purpose of the tax was to combat drug usage, the court went on to hold: "Because revenue collection is one of the objectives of the statute and because imposition of the tax does not expressly depend on the illegal nature of the sale or possession of marijuana, we hold that the statute is constitutionally valid under the United States Constitution." 14 Kan. App. 2d at 640.

In *Berberich*, the defendant requested that we overrule the holding in *Matson*, making the same argument that the tax constituted a criminal penalty. We declined to do so. 248 Kan. at 863-68.

The Montana tax, on the other hand, was not only expressly dependent upon the commission of a crime and the illegal nature of the drugs, it did not even give rise to taxation until "after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax." 128 L. Ed. 2d at 780. The Kansas tax is levied on the possession of drugs regardless of whether the taxpayer has been arrested for criminal conduct. The tax is due immediately upon acquisition or possession of marijuana in the state; criminal prosecution is not required. Significantly, the taxpayer is not required to expose his or her identity to comply with the tax, and any information obtained through compliance with the Act is confidential and cannot be used against the taxpayer in a criminal proceeding other than enforcement of

the Act itself. Nor are law enforcement officers required to report drug arrests to KDR. The Director of Taxation assesses the tax based on personal knowledge or information available.

The second "unusual feature" of the Montana tax, relied upon by the Court, was that it was a property tax on confiscated goods which was only levied on the taxpayer after the taxpayer no longer owned or possessed the drugs. The Court explained:

> "The Montana tax is exceptional for an additional reason. Although it purports to be a species of property tax – that is, a 'tax on the possession and storage of dangerous drugs,' Mont.Code Ann. § 15-25-111 (1987) – it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed. Indeed, the State presumably *destroyed* the contraband goods in this case before the tax on them was assessed. . . . A tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." 128 L. Ed. 2d at 780-81.

The Kansas tax is due and owing upon acquisition or possession of a specified amount of unlawful drugs in the state and is intended to be assessed when the taxpayer is in possession of the property.

The Court of Appeals in *Matson*, and this court in *Berberich*, determined that the Kansas drug tax did not impose a criminal penalty on the taxpayer/criminal defendants. The issue on appeal in the present case is

whether the recent decision in *Kurth Ranch* requires a different result. The defendant, of course, asserts that it does, while the State takes the position that the narrow holding in *Kurth Ranch*, based upon "unusual features" of the Montana tax not present in our statutes, does not require a finding that the Kansas tax constitutes a criminal penalty for double jeopardy purposes.

In response to *Kurth Ranch*, other jurisdictions have faced similar arguments. In *Milner v. State*, No. 1940550, 1994 WL 740807 (Ala. Civ. App. Dec. 2, 1994), *rev. denied* March 3, 1995, the court summarily concluded that the two unusual features of the Montana tax did not exist in Alabama's drug tax and the holding in *Kurth Ranch* had no application. The drug tax was levied on the possession of drugs, regardless of whether criminal charges were filed against the taxpayer. The second feature was distinguishable because the Alabama tax was an excise tax on the dealer and not a property tax on confiscated goods. The Alabama tax statutes are similar to the Kansas statutes. *Milner* had been arrested in August 1992 for possession of marijuana and subsequently pled guilty to the federal criminal charges in September 1993. In December 1992 the Alabama Department of Revenue executed a final jeopardy tax assessment against *Milner* in excess of $31,000 for failure to purchase and affix drug stamps to the same marijuana that was the basis of the federal criminal charges. The Alabama court reviewed two earlier cases, *Hyatt v. State Dept. of Revenue*, 597 So.2d 716 (Ala. Civ. App. 1992), and *Briney v. State Dept. of Revenue*, 594 So.2d 120 (Ala. Civ. App. 1991), which had upheld the tax against double jeopardy arguments, and went on to state:

"Milner suggests that we revisit Hyatt and Briney due to a recent decision of the *Supreme Court. Dept. of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

"In *Kurth Ranch* the Supreme Court held that Montana's drug tax statute constituted a second punishment for double jeopardy purposes and was therefore unconstitutional. In reaching that decision, the Supreme Court focused on two unusual features of the Montana tax statute.

"The first feature which concerned the Court was that the tax was conditioned on the commission of a crime. The tax was levied only on individuals arrested for possession of drugs. The second feature which concerned the Court was that the tax was assessed on confiscated goods. The Court's concern was that the tax was imposed on property that had been confiscated and was no longer in the taxpayer's possession.

"Alabama's drug tax is distinguishable from Montana's drug tax. The two features of the Montana tax that the Supreme Court was interested in do not exist in Alabama's drug tax. In Alabama the drug tax is levied on the possession of drugs, regardless of whether there is a criminal charge against the taxpayer. No criminal prosecution is required. [Citations omitted.] Furthermore, Alabama's tax is an excise tax on the dealer and not a property tax on confiscated goods. "Due to these distinctions, we find that the holding in *Kurth Ranch* has no application to Alabama's drug tax. Concerning the double jeopardy issue, we stand on our prior holdings in *Hyatt* and *Briney*." ___ So.2d at ___ .

In a recent and more thoroughly considered opinion, the Iowa Supreme Court addressed the issue now before us in a nearly identical case. In *State v. Lange*, ___ N.W.2d ___ (No. 68193-1028, filed April 26, 1995), the defendant was arrested for the manufacture of marijuana after two potted marijuana plants were found in his apartment following a consensual search of the premises. There were no drug tax stamps affixed to either plant. The State filed an information against Lange charging him with manufacture of a controlled substance. Several months later, the State filed a second complaint accusing Lange of failure to affix a drug tax stamp to the marijuana which formed the basis for the first charge.

Lange was found guilty on the charge of manufacturing marijuana prior to any trial on the drug tax stamp charge. At a bench trial the court found Lange guilty of the drug tax stamp charge, but Lange challenged the entry of judgment on his conviction, asserting that as he had paid $1,085 in drug tax assessments prior to trial any subsequent punishment would violate his right against double jeopardy. His challenge was denied, and the court imposed a sentence on the drug tax stamp charge. Lange appealed asserting several issues, including double jeopardy based upon *Kurth Ranch*.

Because of the similarity in the facts, statutes, arguments, and issues in *Lange* and our present case, we quote at length from the Iowa decision. The court stated:

> "*Lange*'s third contention is that his sentence on the drug tax stamp conviction constituted double punishment in violation of his right against double jeopardy. For that reason, he believes the district court erred when it imposed

a second punishment based on the same offense. *Lange* bases the double punishment contention on the fact that before his sentence on the drug tax stamp conviction, he had been assessed and had paid $1085 in drug tax stamp assessments. These assessments were on the drugs that formed the basis for the drug tax stamp charge and conviction. *Lange* made this same contention and cited the assessment to the sentencing judge. In support of his contention, *Lange* cited In re *Kurth Ranch*, 986 F.2d 1308 (9th Cir.1993).

"In re *Kurth Ranch* has since reached the United States Supreme Court. *See Montana Dept of Revenue v. Kurth Ranch*, 511 U.S. ___, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In *Montana Department of Revenue v. Kurth Ranch*, the Supreme Court had a Montana statute before it that imposes a tax 'on the possession and storage of dangerous drugs.' *Id.* at ___, 114 S. Ct. at 1941, 128 L. Ed. 2d at 773. This statute expressly provides that the tax is to be 'collected only after any state or federal fines or forfeitures have been satisfied.' *Id.* at ___, 114 S. Ct. at 1941, 128 L. Ed. 2d at 773. The tax is either ten percent of the assessed market value of the drugs or a specified amount depending on the drug ($100 per ounce for marijuana). Under agency rules, taxpayers must file a return within seventy-two hours of their arrest. The taxpayer has no obligation to file a return or to pay any tax unless and until the taxpayer is arrested. The Montana statute presented the Supreme Court with the following question: 'whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the

same offense.' *Id.* at ___, 114 S. Ct. at 1941, 128 L. Ed. 2d at 772-73. This is the same double jeopardy argument *Lange* raises with us. See *id.* at ___ n. 1, 114 S. Ct. at 1941 n. 1, 128 L. Ed. 2d at 773 n. 1 (Double Jeopardy Clause of Fifth Amendment to federal Constitution protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense). The question turned on 'whether the tax has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause.' *Id.* at ___, 114 S. Ct. at 1945, 128 L. Ed. 2d at 778.

"The Supreme Court began its analysis by 'noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax as a form of punishment.' *Id.* at ___, 114 S. Ct. at 1946, 128 L. Ed. 2d at 779. Yet, the Court recognized these attributes as consistent with a punitive character. The Court, however, stopped short of saying these attributes in and of themselves render the tax punitive. *Id.* at ___, 114 S. Ct. at 1946-47, 128 L. Ed. 2d at 779-80.

"The Court zeroed in on the two attributes of the Montana statute that did render it punitive and violative of the Double Jeopardy Clause. First, the tax is conditioned on the commission of a crime. The Court saw this condition as 'significant of penal and prohibitory intent rather than the gathering of revenue.' *Id.* at ___, 114 S. Ct. at 1947, 128 L. Ed. 2d at 779-80. Significantly, the Court said:

> 'In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been

> arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.'

Id. at ___, 114 S. Ct. at 1947, 128 L. Ed. 2d at 780.

"Second, while the statute characterized the tax as a property tax – that is a tax on the possession and storage of dangerous drugs – the Court noted that the tax is actually levied on goods the taxpayer neither owns nor possesses when the tax is imposed. *Id.* at ___, 114 S. Ct. at 1948, 128 L. Ed. 2d at 780-81. On this point, the Court reasoned this way:

> 'Indeed, the State presumably *destroyed* the contraband goods in this case before the tax on them was assessed. If a statute that amounts to a confiscation of property is unconstitutional, a tax on previously confiscated goods is at least questionable. A tax on "possession" of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment. 'Taken as a whole, this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis.'

Id. at ___, 114 S. Ct. at 1948, 128 L. Ed. 2d at 781 (citations omitted).

"Our drug tax stamp statute had neither characteristic that the Supreme Court found punitive in the Montana statute. Iowa Code section 421A.1(3) imposes the tax on a dealer and makes the tax due and payable immediately upon manufacture, production, acquisition, purchase or possession by a dealer. A 'dealer' is defined as

> 'any person who ships, transports, or imports into this state or acquires, purchases, possesses, manufactures, or produces in this state any of the following:
>
> 'a. Seven or more grams of a taxable substance other than marijuana, but including a taxable substance that is a mixture of marijuana and other taxable substances.
>
> 'b. Forty-two and one-half grams or more of a substance consisting of or containing marijuana.
>
> 'c. Ten or more dosage units of a taxable substance which is not sold by weight.'

Iowa Code § 421A.1(3). As this statute makes clear, no tax is imposed unless certain threshold limits are reached. For example, in the case of marijuana, no tax is imposed below forty-two and one-half grams. And, in the case of marijuana, the rate of tax above this amount is five dollars for each gram or portion of a gram. Iowa Code § 421A.7. So a person may possess a controlled substance illegally but still not be subject to the tax.

"The Iowa director of revenue and finance has the statutory obligation to assess and collect the tax after the director learns that a drug tax stamp was required but not purchased. *See* Iowa

Code § 421A.9. The director collects the tax in the same manner as provided for the collection of delinquent income taxes. *Id.*

"Unlike the Montana tax, the imposition of the Iowa tax is therefore not conditioned on the commission of a crime. Nor is it exacted only after the taxpayer is arrested.

"Moreover, in *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993), we held that the tax under section 421A-7 – and an additional penalty for failure to pay the tax under section 421A.12 – did not impose additional punishment for criminal conduct in violation of due process. Rather, we held that such a tax and penalty were a legitimate tax and civil sanction that were not conditioned on commission of a crime. *Id.* at 444-45.

"In *Gallup*, we concluded our drug tax stamp statute was no different than the federal marijuana statute that was upheld in *United States v. Sanchez*, 340 U.S. 42, 71 S. Ct. 108, 95 L. Ed. 47 (1950). *Id.* at 445. ('We see no substantial difference between chapter 421A and the federal marijuana statute that was upheld in *Sanchez*. We view the chapter 421A tax and penalty as civil, rather than as criminal, sanctions and as a proper exercise of the State's taxing power.')

"In *Kurth Ranch*, the Supreme Court relied on *Sanchez* to support its analysis that a tax conditioned on the commission of a crime is a criminal rather than civil sanction. The Court, referring to *Sanchez*, noted that the Court 'has relied on the absence of such a condition to support its conclusion that a particular federal tax was a civil rather than a criminal sanction." *Kurth Ranch*, 511 U.S. at ___, 114 S. Ct. 1947, 128

L. Ed. 2d at 780. In a footnote to this statement the Court said:

> 'In *Sanchez* we examined a federal marijuana tax [since repealed] that taxed the transfer of marijuana to a person who has not paid a special tax and registered. Under the statute, the transferor's liability arose when the transferee failed to pay the tax; as a result, "[s]ince his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction." 340 U.S. at 45, 715 S. Ct. at 110, 95 L. Ed. at 50.

Id. at ___ n. 20, 114 S. Ct. at 1947 n. 20, 128 L. Ed. 2d at 780 n. 20.

> "In contrast to the Montana tax, the Iowa drug stamp tax is imposed immediately upon manufacture, production, acquisition, purchase, or possession of the controlled substance. *See* Iowa Code § 421A.3. The Iowa tax, therefore, is not – like the Montana tax – imposed on goods a taxpayer neither owns nor possesses.
>
> "We conclude the Iowa drug stamp tax statute is not a criminal penalty. Because it is not a criminal penalty, the sentence on the drug tax stamp conviction did not constitute a second punishment violative of *Lange*'s right against double jeopardy." ___ N.W.2d at ___.

We recognize at least two state courts in other jurisdictions have concluded differently; however, those decisions are currently pending review. We agree with the Iowa court's analysis and reasoning. The Kansas Drug Tax Act is significantly different than the Montana Tax Act considered in *Kurth Ranch*. The Kansas Act does not

contain the "unusual features" upon which the court relied in *Kurth Ranch,* and we conclude that the Kansas drug tax does not impose a criminal penalty for double jeopardy purposes. We adhere to the earlier decisions in *Matson* and *Berberich.* The trial court erred in finding further prosecution of the complaint against the defendant would subject her to double jeopardy.

The judgment is reversed, and the case is remanded to the district court for further proceedings.

(2) (2)

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Docket Nos. 96-84, 96-83

In the

Supreme Court of the United States

1995 October Term

ROY L. JENSEN, HOWARD S. SIMPSON,

Petitioners,

v.

STATE OF KANSAS,

Respondent.

ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

JOINT BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI BY RESPONDENT STATE OF KANSAS

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JOINT BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI BY RESPONDENT STATE OF KANSAS

I. THE PETITIONERS' ARGUMENT

Petitioners make the following argument in their Petitions for Certiorari:

> Does a criminal prosecution after the assessment of a state drug tax and one hundred percent penalty for the possession of marijuana, imposed prior to and independently of the criminal proceeding, violate double jeopardy principles established in *Department of Revenue of the State of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S. Ct. 1937 (1994)?

Petition at i.[1] Petitioners thereafter offer the following sub-issues on this sole point:

> A. The Kansas decision improperly interprets the holding in *Kurth* by creating an "unusual features" test instead of looking at the tax as a whole to determine whether it constitutes punishment for jeopardy purposes.
>
> B. State Appellate Courts are divided in their interpretation of *Kurth* creating directly conflicting decisions.

Petition at 4, 7. The State of Kansas respectfully submits that neither of these points has merit.

II. SUPPLEMENTAL STATEMENT OF FACTS

On a most significant point, the petitioners have failed to correctly advise the Court as to the facts of this case. The "Journal Entry Finding Defendant Guilty of Count Two" indicates that the petitioner *Jensen* was found guilty on the charge of *possession of marijuana with intent to sell* without paying the drug tax and that conviction is in issue in this case. Petitioner's Appendix at 60-61.[2] The charge of *possession with intent to sell marijuana within 1000 feet of a school* was dismissed by the district court based on Double Jeopardy but reinstated by the Kansas Supreme Court in the decision below, and that charge is in issue in this case. *State v. Jensen,*

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[1] The petitions of Jensen and Simpson are, for purposes of the State's response, identical. As such, except where otherwise specifically noted, all references herein are to the page numbers in petitioner Jensen's petition including his appendix.

[2] References hereinafter to the appendix will be indicated by "App." followed by the page number. All references are to petitioner Jensen's appendix except where otherwise specifically noted.

259 Kan. 781, 796-97, 915 P.2d 109 (1996) (App. at 1, 26-27, 38).

The "Memorandum of Decision" and "Journal Entry" entered in petitioner *Simpson's* case indicate that the State dismissed the charge of possession of marijuana without paying the drug tax. Simpson App. at 28, 44. The charge of *possession of marijuana with intent to sell* was dismissed by the district court based on Double Jeopardy but reinstated by the Kansas Supreme Court in the decision below, and that charge is in issue in this case. *Jensen*, 259 Kan. at 796-97 (Simpson App. at 1, 26-27, 28, 39).

Both petitioners were assessed drug tax pursuant to Kansas' drug tax law. K.S.A. 79-5201(c) thereof, App. at 62, requires that the person possess *more than 28 grams*.

The significance of these facts will be discussed in greater detail, § III C 1, below. Suffice it to say here, however, that in addition to the other reasons why Double Jeopardy does not apply in this case, neither petitioner has been twice punished for the "same offense."

III. ANALYSIS OF PETITIONERS' ARGUMENT:

A. PETITIONERS' CLAIM THAT: "THE KANSAS DECISION IMPROPERLY INTERPRETS THE HOLDING IN KURTH BY CREATING AN 'UNUSUAL FEATURES' TEST INSTEAD OF LOOKING AT THE TAX AS A WHOLE TO DETERMINE WHETHER IT CONSTITUTES PUNISHMENT FOR JEOPARDY PURPOSES"

The petitioners claim that the Kansas Supreme Court in its decision below incorrectly applied an "unusual features" test to gauge the constitutionality of Kansas' drug tax law against this Court's decision in *Kurth*. Petitioners claim that

the correct test is the tax "as a whole." The petitioners incorrectly read this Court's decision in *Kurth*, however, and inaccurately portray Kansas' drug tax law. The issue is clearly no more than an attempt on their part to obscure the real issues.

1. PETITIONERS INCORRECTLY READ KURTH

Any doubt concerning the appropriateness of analysis of a drug tax law's "unusual features" test vanishes with the words of Justice Stevens, author of the majority opinion in *Kurth*, in his dissent in part, concurrence in part, in *United States v. Ursery*, 116 S. Ct. 2135 (1996) (discussed in greater detail, § III C 2, below). Referring to *Kurth*, Justice Stevens stated:

> [In Kurth] we considered the nature of the tax, *focusing on several unusual features* that distinguished it from ordinary revenue-raising provisions . . . . *On that basis*, we held that imposition of the tax after criminal prosecution of the taxpayer violated double jeopardy [emphasis supplied].

Id. at 2157.

The majority opinion in *Ursery* also confirmed that the Court employed an "unusual features" analysis in *Kurth:*

> [In *Kurth*,] *[s]everal differences* between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. . . . *From these differences*, we determined that the tax was motivated by a " 'penal and prohibitory intent rather than the gathering of revenue [emphasis supplied].' "

Id. at 2144.

The language of *Kurth* also supports this conclusion and petitioners have quoted the operative language in their Petitions:

> Taken as a whole, this drug tax is *a concoction of anomalies* too far removed *in crucial respects* from the standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis [emphasis supplied].

Petition at 5. As such, petitioners' claims are clearly misplaced that a reviewing court is not required to compare the various features in a particular law with those features this Court determined objectionable in *Kurth*.

The Kansas Supreme Court previously conducted just such a comparison in holding Kansas' law distinguishable from Montana's in *Kurth*. *State v. Gulledge*, 257 Kan. 915, 922-30, 896 P.2d 378 (1995)(App. at 78-103).[3] In fact, the Court held Kansas' law "significantly different [from] the Montana Tax Act." *Id.* at 930 (App. at 102). The Kansas Supreme Court, in the decision below, relied on *Gulledge* to reiterate its holding that, given its particular features, Kansas' law is not punishment for Double Jeopardy purposes. *State v. Jensen*, 259 Kan. 781, 791-97, 915 P.2d 109 (1996) (App. at 17-27). The Kansas Supreme Court clearly applied the correct standard of review as dictated by this Court in *Kurth*, and petitioners' claims to the contrary have absolutely no merit.

2. PETITIONERS INACCURATELY PORTRAY KANSAS' DRUG TAX

a. PETITIONERS' CLAIM THAT ALL KANSAS DRUG TAXPAYERS ARE IN VIOLATION OF LAW

Petitioners also make several misstatements in their Petitions concerning the nature of Kansas' drug tax, found in

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[3] Gulledge filed a motion for leave to proceed *in forma pauperis* in this Court but did not file a petition for writ of certiorari.

K.S.A. 79-5201 *et seq.*(App. at 62-69). Petitioners claim that "the entire class of taxpayers subject to this tax are persons in possession of marijuana illegally." Petition at 4. This statement is misleading. As construed by the Kansas Supreme Court in *Gulledge*, above, 257 Kan. at 924 (App. at 91, Kansas' tax "does not apply to everyone who illegally possesses drugs. It only applies to those possessing illegal drugs in larger quantities in response to the legislative concern that this flourishing underground economy not operate on a tax-free basis." *Accord Covelli v. Commissioner of Revenue Services*, 668 A.2d 699, 705 n.20 (Conn. 1995), *vacated and remanded, Covelli v. Commissioner*, 116 S. Ct. 2577 (1996). If the Kansas legislature had intended to make the drug tax law strictly a crime-fighting device, it clearly would have covered *all* conduct made criminal by Kansas' Uniform Controlled Substances Act, K.S.A. 65-4101 *et seq.*, not just *some*.

Similarly, other Kansas taxes are imposed only on those making a business or other gain out of the venture. For example, Kansas' retailer's sales tax, K.S.A. 79-3601 *et seq.*, is not imposed on most "isolated or occasional sales." K.S.A. 79-3606(l). Further, Kansas' income tax, K.S.A. 79-3201 *et seq.*, is imposed only on those with incomes exceeding certain benchmarks. *E.g.*, K.S.A. 79-3220(a).

Regardless of the reach of Kansas' drug tax, this Court in its most recent explanation of the reach of the Double Jeopardy clause, noted that "though both statutes [criminal and forfeiture] are tied to criminal activity, as was the case in [a precedent case], this fact is insufficient to render the statutes punitive. . . . By itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *Ursery*, above, 116 S. Ct. at 2149 (*Ursery* is discussed in greater detail, § III C 2, below).

b. PETITIONERS' CLAIM THAT KANSAS' TAX RATE IS HIGH

The petitioners also argue that Kansas' drug tax rate is allegedly eight (8) times Montana's tax rate in *Kurth*. As support, the petitioners allege that Kansas' tax is imposed every three (3) months, Petition at 4, 7, and that a 100% penalty is imposed when the taxpayer fails to pay the tax, *id.* at 4, 7. Petitioners assert that "it was anticipated that no one would pay the tax when due . . . ." *Id.* at 7.

Apart from the absence of any factual support in their Petitions for the last claim,[4] the other statements are again not accurate. As construed by the Kansas Supreme Court in *Gulledge*, above, the reason why Kansas' tax stamps are valid for three (3) months (rather than indefinitely) is that "Presumably, the short life span of the tax stamps reflects the legislature's recognition of the rapid turnover rate of illicit drugs." 257 Kan. at 923 (App. at 91). The charges against petitioners involving the intent to sell illustrate the point. Certainly, there is no claim in this case that the petitioners, or anyone else for that matter, have been required to pay the drug tax more than once. In any event, other Kansas taxes, property taxes, for example, are imposed on a periodic basis (yearly). K.S.A. 79-5106 (motor vehicles); 79-2004a (other personal property); 79-2004 (real property).

As concerns the petitioners' claim that the 100% penalty imposed for the failure to timely pay the tax is additional evidence of an allegedly high tax rate, the correct construc-

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[4] In *Gulledge*, the Kansas Supreme Court noted that "The brief of *amicus curiae* Kansas Department of Revenue (KDR) states that over one-half million dollars in drug tax was collected in both fiscal year 1993 and fiscal year 1994." 257 at 919 (App. at 84). Clearly, someone has been paying the tax, whether voluntarily or involuntarily.

tion of Kansas' law is that by the Kansas Supreme Court in this case:

> The express language of [K.S.A.] 79-5208 supports the understanding that what is being penalized is the failure to pay the tax. . . . Since the 100 percent penalty is exacted for failing to pay the drug tax rather than possessing the drug, Jensen and Simpson were not punished more than once for failing to pay the drug tax. . . . The 100 percent penalty is punishment for the offense of failing to pay the drug tax, and the punishment for the dismissed charges would have been for possessing the drug.

Jensen, above, 259 Kan. at 796 (App. at 25-26). Significantly, the 100% drug tax penalty is consistent with numerous other tax penalties found in Kansas law, as amicus Kansas Department of Revenue argued below[5]; petitioners have never addressed this fact.

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[5] *E.g.*, K.S.A. 40-246a, 40-246c (200% penalty ["double the amount of the tax"] for failure to pay insurance law tax); K.S.A. 41-407(a)(1) (200% penalty ["double the amount of the tax"] for evading liquor tax); K.S.A. 79-1434(b) (200% penalty ["twice the amount of tax"] for failure to pay transient dealer tax); K.S.A. 79-1427a (50% penalty for failure to report taxable personal property); K.S.A. 79-3228(d) (100% penalty for failure to pay, or timely pay, income tax); K.S.A. 79-3322(a) (100% penalty for failure to pay cigarette tax license or permit fee, or cigarette tax); K.S.A. 12-1,105 (50% penalty for failure to file return of gross earnings); K.S.A. 12-1694b(d), 12-1698a(d) (50% penalty for failure to timely pay or report transient guest tax); K.S.A. 79-332a(a)(2) (50% penalty for failure to timely file return of assessment of oil and gas); K.S.A. 79-3615(d) (50% penalty for fraudulent failure to file or pay, *etc.*, sales tax); K.S.A. 79-4225(a) (50% penalty for fraudulent failure to file or pay severance tax); K.S.A. 79-4705(c) (25% penalty for fraudulent failure to pay bingo tax). K.S.A. 79-3464e(d), amending Kansas' motor fuel tax law, provides for penalties that could be astronomically higher than the tax *per se*.

Thomas v. C.I.R., 62 F.3d 97 (4th Cir. 1995), provides further guidance. There, plaintiff claimed the Double Jeopardy clause barred imposition of a 50% fraud penalty for failure to report income after his conviction on drug charges. The Court rejected the claim, explaining:

> Assessment of an addition to tax does not necessarily follow from a defendant's conviction for § 846 conspiracy. It is possible for a person to participate in the illegal sale of drugs, yet pay taxes based on the income generated by those sales. In that instance, punishment for the drug offense would be proper, but there would be no basis for holding the defendant accountable for tax deficiencies or additions to tax. Conversely, a person could participate in wholly legal activities, yet be delinquent in his payment of income taxes. While there would be no basis for a criminal prosecution relating to the income-generating activity, the government would be entitled to payment of a tax deficiency and, depending on the amount of the deficiency, possibly to an addition to tax for civil fraud. Like the tax court, we find that Thomas' violations of the criminal and civil law stemmed from wholly distinct conduct. [Citation omitted.]

Id. at 99-100. *Accord Hyatt v. State Department of Revenue*, 597 So. 2d. 716, 718-19 (Alab. 1992) (drug tax).

As such, the petitioners' claim that Kansas' tax rate is effectively doubled by imposition of the tax penalty is inaccurate. If a taxpayer complies with the law, he or she will not be faced with the prospect of paying any penalty.

c. PETITIONERS' CLAIM THAT KANSAS' TAX IS IMPOSED ONLY AFTER ARREST

The petitioners also claim that Kansas' tax in reality is imposed only after the person's arrest. Petition at 6,7. This

statement is, once again, misleading. On its face, Kansas' tax is due and payable "immediately upon possession or acquisition" in Kansas. K.S.A. 79-5204(d)(App. at 65). The Kansas Supreme Court explained that:

> The Kansas tax is levied on the possession of drugs regardless of whether the taxpayer has been arrested for criminal conduct. The tax is due immediately upon acquisition or possession of marijuana in the state; criminal prosecution is not required. . . . The Kansas tax is . . . intended to be assessed when the taxpayer is in possession of the property.

Gulledge, above, 257 Kan. at 924-25 (App. at 92, 93). The federal income tax system is to the same effect, effectively a "self-assessment" system.

The fact that persons may chose to evade the drug, or other, tax should not transform the event triggering the tax, here, the act of possession or acquisition. As the *Covelli* court explained:

> We acknowledge that in many, if not most, cases, Connecticut's tax will not be imposed until the taxpayer has been arrested and until the illegal drugs have been confiscated or destroyed. The practicalities surrounding the imposition of the tax, however, merely reflect the reality of attempting to tax an illegal activity. [Citation omitted.] The taxpayer's voluntary choice to ignore his or her tax obligations should not be the determinative factor in evaluating whether Connecticut's tax constitutes punishment in the double jeopardy context. . . . It would be anomalous indeed if persons conducting an illegal business were excused from the payment of a tax on that business because the failure to pay the tax was not discovered, as a result of their own dereliction, until after

> they had been arrested and double jeopardy protection attached. [Citation omitted.]

Covelli, above, 668 A.2d at 706.

The petitioners' claim that Kansas' drug tax is in reality only imposed after arrest is subject to their proof, the party attacking the constitutionality of a Kansas law bearing the burden of proof on the issue, *State v. Durrant*, 244 Kan. 522, Syl. ¶ 1, 769 P.2d 1174, *cert. denied*, 492 U.S. 923 (1989). There is no such proof in this record.

d. ADDITIONAL FEATURES OF KANSAS' LAW NOT NOTED BY PETITIONERS

Additional features of Kansas' drug tax law not specifically noted by petitioners in their Petitions should be examined:

i. PROOF OF HIGH TAX RATE

As concerns the high rate of tax feature, there is simply no evidence in this case that the drug tax assessment against petitioners was greater or less than the market (or other benchmark) value of the quantity of marijuana that the petitioners possessed. In fact, the Kansas Supreme Court noted just such a defect in proof in the defendant's constitutional challenge in *Gulledge*:

> Additionally, as *amicus curiae* points out, there is no evidence in this case regarding the relationship of the assessment to the market value of the marijuana or any other benchmark. The market value can vary depending on a number of factors, such as quality, supply and demand and volume sold. . . . In the present case there is simply no evidence on this point.[6]

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[6] In *Kurth*, testimony was presented concerning the market value of the drugs in issue. 511 U.S. ___, 114 S. Ct. at 1943, 1946 n.17.

Gulledge, above, 257 Kan. at 923 (App. at 90-91).

While Kansas' drug tax rate for marijuana, K.S.A. 79-5202(a)(1) (App. at 63), is in part identical to Montana's,[7] the question how that tax rate fares against market (or other benchmark) value is a *fact-driven* question; the State of Kansas should not be bound by the *evidence* in *Kurth*. *Cf. Richards v. Jefferson County*, 135 L. Ed. 2d 76 (1996) (by analogy; due process bars application of collateral estoppel to person neither a party to prior action nor in privity with party).

ii. DETERRENT PURPOSE

Nor is deterrent purpose dispositive of the issue. The State does not dispute that Kansas' drug tax is intended in part to deter person's engaging in such conduct, and the Kansas Supreme Court has so noted. *Gulledge*, 257 Kan. at 923 (App. at 90); *Durrant*, above, 244 Kan. at 531. Without more, this is an unremarkable proposition for an excise tax, however, as the existence of excise taxes on alcoholic beverages and tobacco products proves.

Significantly, this Court seems to have agreed in its most recent explanation of the reach of the Double Jeopardy clause: "although both statutes [criminal and forfeiture] may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals." *Ursery*, above, 116 S. Ct. at 2149. As such, deterrent purpose is not damning in Double Jeopardy litigation.

In any event, the Kansas Court of Appeals noted of legislative deliberations on the drug tax:

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[7] Kansas' law is also materially different because it does not contain a variable provision, as did Montana's, that the tax would be the *greater* of two benchmark rates, there, *the greater* of $100 per ounce or 10% of market value. 511 U.S. ___, 114 S. Ct. at 1946 n.17.

> Although the minutes of the Kansas House and Senate Committees show that the primary purpose of the act was to combat drug usage, raising revenue was a motive that was definitely considered. The committee minutes reflect the following statement by Rep. Robert Miller: "The taxes would provide a way to tax part of the flourishing underground economy that is normally operating on a tax-free basis."

State v. Matson, 14 Kan. App. 2d 632, 640, 798 P.2d 488 (1990). In addition to this judicial recognition that Kansas' law was also designed to raise revenue, Kansas' drug tax in fact serves that purpose. Note 4, *supra*.

iii. TAX CHARACTERISTICS

The 1994 Kansas legislature further recognized the fundamentally *tax* nature of the law by incorporating similar collection procedures from the Kansas income tax act, K.S.A. 79-3235, and from chapter 60 generally. K.S.A. 79-5212 (not contained in petitioner's appendix). Although "jeopardy" collection features remain in the drug tax law, K.S.A. 79-5205(a) (App. at 65), such features are by no means common and also exist in Kansas' income tax act, K.S.A. 79-3229, and sales tax act, K.S.A. 79-3610. The Kansas Department of Revenue also recognizes the fundamentally *tax* nature of the law through its administration of the law. Hearings pursuant to the drug tax law are held before the Director of Taxation just as are all other tax hearings at that level, and may be appealed in the same fashion. *E.g.*, K.S.A. 79-5205(b) (App. at 66); 74-2438. Further, if the person is unable to pay the tax, a payment plan might be worked out. App. at 41 (tax warrant).

iv. REPORTING REQUIREMENT

In addition, in Montana, law enforcement officers making drug arrests were *required* to report to the Montana Rev-

enue Department. 511 U.S. ___, 114 S. Ct. at 1941. Although cooperation may exist between the Kansas Department of Revenue and law enforcement, Kansas has no such reporting requirement. *Gulledge*, above, 247 Kan. at 925 (App. at 93). Rather, the Director of Taxation assesses tax based on personal knowledge or information. K.S.A. 79-5205(a)(App. at 65); *Gulledge*, above, 257 Kan. at 925 (App. at 93).

v. INCRIMINATION

The *Kurth* Court also noted that in Montana, taxpayers were required to file a drug tax return within seventy-two hours of their arrest, 511 U.S. ___, 114 S. Ct. at 1941, and nowhere referred to any self-incrimination protection under Montana's law. Kansas' law, however, protects against the taxpayer's compelled incrimination:

> All information obtained through compliance with K.S.A. 79-5201 *et seq.* is confidential and may not be used as evidence in the prosecution for any crimes other than enforcement of the act itself. Any evidence obtained through the use of such confidential information is likewise confidential and inadmissible in the prosecution of any criminal offense, other than for the enforcement of the act itself.

Durrant, above, Syl. ¶ 12. *See also* K.S.A. 79-5206 (App. at 66); *Gulledge*, above, 257 Kan. at 925 (App. at 92-93). Nor, as noted above, is the taxpayer's obligation to pay the tax tied to any criminal arrest or prosecution. As such, Kansas drug taxpayers are simply not required to make the difficult choices that the pendency of a criminal prosecution may entail. *E.g. South Dakota v. Neville*, 459 U.S. 553, 564 (1983).

B. PETITIONERS' CLAIM THAT: "STATE APPELLATE COURTS ARE DIVIDED"

Central, perhaps, to the success of their Petitions is petitioners' claim that State appellate courts are divided on the question of the proper interpretation of *Kurth*. *E.g.*, Sup. Ct. R. 10(b). Petitioners rely on decisions from Illinois, Indiana, Nevada, and Texas each State holding its particular drug tax law unconstitutional. *Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995); *Desimone v. State*, 111 Nev. 1221, 904 P.2d 1 (1995), *vacated and remanded, Nevada v. Desimone*, 116 S. Ct. 2576 (1996); *Ward v. State*, 915 S.W.2d 941 (Tex. App. 1996); *Stennett v. State*, 905 S.W.2d 612 (Tex. App. 1995). The law in each decision is, however, distinguishable from Kansas'. As such, there is no conflict as respects the constitutionality of Kansas' law.

The Illinois law in issue in *Wilson*, above, relied on in petitioners' Petitions at 6 n.1; 9, is readily distinguishable from Kansas'. There, the highest Illinois Court construed Illinois' law to require as a triggering event for drug tax liability not only the fact of possession of a controlled substance by the taxpayer, *but also the taxpayer's arrest, charging, and conviction of a criminal offense*. 662 N.E.2d at 420. As noted above, Kansas' law is not so dependent. The effect of that construction of Illinois' law also led the Illinois Court to note that the taxpayer was *unavoidably* liable for the penalty for failure to pay the tax plus interest, and no longer possessed the goods on which the tax was imposed, the latter a factor relied on by this Court in *Kurth*. *Id.* Kansas law, as explained, above is to the contrary.

The Indiana decision in *Bryant*, above, also relied on in their Petitions at 6 n.1; 9, is also readily distinguishable.

There, the Court first noted that the limited validity of a receipt for payment of taxes (forty-eight [48] hours) was consistent with a deterrent purpose. 660 N.E.2d at 296. As noted, Kansas has no such provision. Further, the Indiana tax rate was "$40.00 per gram, or $1,133.96 per ounce. This is a rate of over ninety times the market value and more than eleven times the rate imposed in *Kurth*." *Id.* Kansas' rate, as noted, is no higher than was Montana's. Although the Court also referred to other provisions in Indiana law which petitioners may claim are similar to those in Kansas law, *i.e.* tax commissioned on commission of criminal act and tax not imposed until after the person's arrest, *id.* at 296-97, the similarity is facial only and will not withstand close scrutiny, as the State has explained above concerning these features. The decision is not, in any event, final; the State of Indiana's petition for certiorari, filed March 26, 1996, remains pending before this Court in case No. 95-1567.

The original Texas decision in *Stennett*, above, was vacated by this Court on the defendant's petition for certiorari and remanded by this Court for further consideration in light of *Kurth*. 905 S.W.2d at 613. On remand, although the Texas Court of Appeals ultimately held Texas' law constituted punishment, it did not do so until determining that the law also contained several extra "unusual features" which even Montana's did not have: the tax collector cannot settle a tax case absent written request from the prosecutor; tax proceedings are postponed at the request of the prosecutor pending determination of the criminal case; the tax collector's right to collect the tax is subordinate to the State's right of forfeiture; and sale/possession of simulated substances is subject to the tax. *Id.* at 614. Petitioners have not noted these facts in their

Petitions. Kansas' law, however, has none of these extra "unusual features" in its law.[8]

Petitioners also fail to note that the neither *Stennett* nor *Ward* can be considered the final word from Texas. Although *Ward* was not further appealed, *Stennett* was appealed from the Court of Appeals to Texas' criminal court of last resort, the Court of Criminal Appeals. The undersigned understands that case has been argued and remains under advisement.

The Nevada law in issue in *Desimone*, above, is also distinguishable from Kansas'. Most significantly, Nevada's marijuana tax rate of $100 per gram, 904 P.2d at 4, far outstrips Kansas' tax rate. Further, Nevada law not only required that the taxpayer pay the tax but also "register[] with the Department." *Id.* at 2. Kansas' law has no such registration requirement. Further, the Nevada Court found clear legislative intent that the law was designed "to punish." *Id.* at 5. The constitutionality of Kansas' law has been repeatedly examined, *e.g.*, *Gulledge*, *Jensen*, above (and cases cited therein), but no such sinister motive uncovered. In any event, as petitioners note, Petition at 11, the decision in *Desimone* was vacated by this Court for further consideration in light of this Court's recent forfeiture decision in *Usery*, above (also discussed § III C 2, below).

Also not noted by petitioners is the decision by the North Carolina Court of Appeals in *State v. Ballenger*, 472 S.E.2d 572 (N.C. 1996). There, the Court conducted an "unusual features" analysis to hold that imposition of the tax did not

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[8] Inexplicably, the petitioners claim that the Texas decisions in *Stennett* and *Ward* did not contain an "unusual features" analysis. Petition at 8-10. These statements are clearly wrong as both Courts clearly used just such analysis. *Stennett*, 905 S.W.2d at 613-15; *Ward*, 915 S.W.2d at 946.

constitute punishment. *Id.* at 574-75. North Carolina's law is very similar to Kansas'. *See also Milner v. State*, 658 So. 2d 500 (Alab. App. 1994), *cert. denied* (1995)(post-*Kurth*; drug tax held constitutional); *State v. Stubblefield*, 249 Neb. 436, 543 N.W. 2d 743 (1996)(same); *McMullin v. S.C. Dept. of Rev. & Taxation*, 469 S.E.2d 600 (S.C. 1996)(same).

As such, although there may indeed be a "conflict" among State decisions whether *their* various drug tax laws pass constitutional muster in the eyes of the various state courts, the State respectfully submits that Kansas' law is distinguishable from those laws held unconstitutional. As such, there is simply no conflict as respects the constitutionality of Kansas' law.

C. ADDITIONAL MATTERS RELEVANT TO THIS COURT'S DETERMINATION OF THE PETITIONS

1. PETITIONERS HAVE NOT BEEN PUNISHED FOR THE "SAME OFFENSE" THEREFORE DOUBLE JEOPARDY IS NOT IMPLICATED IN THIS CASE

As noted § II, above, the charges/convictions in issue in this case have the common element of the *intent to sell*. Also as there noted, Kansas' drug tax law requires possession of more than twenty-eight (28) grams of marijuana. K.S.A. 79-5201(c) (App. at 62).

Under Kansas law, the determination whether a person criminally possessed marijuana with the intent to sell is not entirely dependent on quantity but may be proven by "equipment found with it, place it was found, manner of packaging, and opinion of experts that the narcotic was packaged for sale." *State v. Heiskell*, 21 Kan. App. 2d 105, 112, 896 P.2d 1106 (1995).

The Double Jeopardy clause prohibits three (3) things: "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Kurth*, 511 U.S. ___, 114 S. Ct. 1937, 1941 n.1. An appropriate inquiry in this case is whether the petitioners have been subjected to multiple punishments for the same offense. If the petitioners were "punished" for *different* offenses, the Double Jeopardy clause is not implicated. For the reasons stated below, the Clause is not implicated in these cases because the criminal offenses with which the petitioners have been charged/convicted are simply not the "same offense" as the "offense" of drug tax liability.

Answering the question what constitutes the "same offense" within the meaning of Double Jeopardy parlance ini-

tially requires a determination whether "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993). This requirement has been incorporated into Kansas law. K.S.A. 21-3107(d)(2). *See, e.g., Jarrell v. State*, 212 Kan. 171, 175, 510 P.2d 127 (1973). What constitutes the "same offense" is determined by State law. *State v. Baker*, 255 Kan. 680, 683, 877 P.2d 946 (1994)(citing *Brown v. Ohio*, 432 U.S. 161, 167 [1994]).

As noted above, the district court record indicates that the criminal charges of which the petitioners were charged/convicted required the *intent to sell* marijuana.[9] Their drug tax liability, however, required the possession of *more than 28 grams of marijuana*. As such, "each provision requires proof of a fact which the other does not." *Blockburger*, above.[10] *Accord State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743, 747 (1996). The petitioners did not address this critical fact in their Petition.[11]

Alternatively, *State v. Berberich*, 248 Kan. 854, 811 P.2d 1192 (1991), supports this result even without the element of

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[9] The charge in Count II against petitioner Jensen was possession of marijuana *with the intent to sell* without payment of the drug tax. App. at 60. The criminal offense is found in K.S.A. 79-5208. App. at 68. The latter does not *per se* require as an element the intent to sell although it does not plainly exclude such element. As Jensen made no objection on this basis to the charge, however, any objection has been waived. *E.g.*, K.S.A. 22-3208(3).

[10] The criminal charge against the petitioner *Simpson* of failure to pay the drug tax is no longer in issue in this case because the State dismissed the charge. Simpson App. at 28, 44.

[11] The issue was belatedly raised by the State of Montana in *Kurth*, but this Court did not resolve the issue. [illegible] 511 U.S. ___, 114 S. Ct. at 1942 n.9.

intent to sell. There, the defendant contended *inter alia* that he could not be convicted of both possession of methamphetamine and failure to pay the drug tax on the possession of such drug. The Kansas Supreme Court examined K.S.A. 21-3107(d)(2) providing that a defendant cannot be convicted of both a crime and an included crime, the latter defined as "[a] crime necessarily proved if the crime charged were proved." 248 Kan. at 857. The Court rejected the argument, holding that, "A violation of K.S.A. 79-5208 for possession of a controlled substance without affixing the appropriate stamps showing payment of the tax is a separate and distinct offense from possession of marijuana or a controlled substance and one is not an included offense of the other." 248 Kan. at 862.

2. THIS COURT'S DECISION IN URSERY V. UNITED STATES DICTATES DENIAL OF THE PETITION FOR CERTIORARI

On June 24, 1996, this Court decided in *United States v. Ursery*, 116 S. Ct. 2135, that the forfeiture of property used in the commission of a criminal offense for which the owner of such property was also charged criminally, was not punishment for Double Jeopardy purposes. Although the Court there distinguished *Kurth*, 116 S. Ct. at 2144, 2147, this Court subsequently vacated drug tax decisions in Utah and Connecticut for further consideration in light of *Ursery*, as petitioners note, Petition at 11.

In *Ursery*, this Court determined the following two-part test dispositive of the Double Jeopardy issue:

> 1. First, Congress intended forfeiture to be a civil proceeding as most clearly demonstrated by the procedural mechanisms used to enforce forfeiture;

2. Second, other evidence did not disclose punitive form or effect despite Congress' non-punitive intent:

a. the forfeiture was punitive but also served important non-punitive goals;

b. forfeiture has not historically been regarded as punishment;

c. although an innocent owner's property is not subject to forfeiture, the government need not establish intent;

d. the deterrence served by forfeiture also served non-criminal goals; and

e. the fact that the forfeiture is tied to criminal activity without more is insufficient.

Id. at 2147-49. For the same reasons relied on by this Court to determine forfeiture is not a Double Jeopardy punishment, Kansas' drug tax likewise should not be considered punishment.

Initially, it is clear that the Kansas legislature intended the drug tax to be civil in nature; the procedural mechanisms used to enforce the tax are those adopted to enforce other tax liabilities, *i.e.* those under chapter 79 (taxation) and chapter 60 (civil procedure) of the Kansas statutes. § III A 2 d iii, above.

Further, no other convincing evidence discloses a punitive form or effect despite this non-punitive intent: first, although petitioners may claim the tax punitive, it also clearly serves non-punitive goals, for example, deterrence of socially-destructive behavior, raising of revenue for legitimate State purposes, taxation of an underground economy which has largely escaped sharing the burdens imposed on other tax-

payers, and ensuring that persons do not benefit from illegal activity. Second, taxes, like forfeitures, have long been considered legitimate, not punitive. *E.g., United States v. Sanchez,* 340 U.S. 42 (1950). Third, the deterrence created by the tax also serves non-criminal goals as noted above. Fourth, although the tax is tied to criminal activity, there is a legitimate non-criminal law reason for such fact: the activity taxed is one which has largely escaped taxation so far precisely because of its illegality. Finally, there is no scienter requirement beyond that the person must be illegally in possession. As noted, however, that requirement is a wholly unavoidable result of the nature of the activity sought to be taxed, illegal drug possession, sales, manufacture, *etc.*

3. AN ASSET SEIZURE ALONE IS NOT PUNISHMENT THEREFORE DOUBLE JEOPARDY IS NOT IMPLICATED IN THIS CASE

The State of Kansas concedes that one of the purposes of the *criminal* prosecutions of petitioners was punishment. In order to have "double jeopardy," however, it is necessary to have a *prior* jeopardy. Under Kansas law, the party claiming the invalidity or unconstitutionality of State law bears the burden of proof on the issue. *Durrant,* above, 244 Kan. Syl. ¶ 1. As such, petitioners bore the burden of proof in proceedings below to prove that they have been twice "punished" within the meaning of Double Jeopardy. Petitioners failed, however, to prove any in this case because an asset seizure alone is not punishment for Double Jeopardy purposes.

People v. Krizek, 271 Ill. App. 3d 533, 207 Ill. Dec. 857, 648 N.E.2d 313 (1995), is instructive. There, defendant moved to dismiss his drug indictment on Double Jeopardy grounds on the basis that his home was seized although no

final forfeiture order was entered. The Illinois Court of Appeals affirmed the denial of the motion, holding:

> Consequently, although the seizure of real property under the Forfeiture Act marks the beginning of the civil forfeiture process, the actual seizure itself has limited legal significance. The act of seizure neither extinguishes the ownership rights of claimants to the property, nor does it vest title in the State. The respective ownership rights of the parties remain unaltered until such time as the trial court enters its final judgment. Until final judgment is entered, the claimant has the opportunity to retain his ownership rights in the property. Common sense dictates that it is the deprivation of ownership, not the deprivation of the unencumbered use of the property, that determines when punishment for double jeopardy purposes occurs. The State's seizure of defendant's property, therefore, does not constitute punishment for double jeopardy purposes [citations omitted].

648 N.E.2d at 316. *See also United States v. Torres*, 28 F.3d 1463 (7th Cir.), *cert denied*, 115 S. Ct. 669 (1994)(prior forfeiture proceeding in which defendant made no claim to money did not bar subsequent criminal proceeding involving same conduct; "[y]ou can't have double jeopardy without a former jeopardy").[12]

In the State district court, the petitioners claimed, and the district court determined, that an asset seizure had occurred. Jensen App. at 28-29; Simpson App. at 29. Nothing

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[12] *Gulledge*, above, is distinguishable on this point because there, the Kansas Supreme Court noted that the parties stipulated that, "the seizure of the [defendant's] $428.00 is final and, otherwise, non-appealable." 257 Kan. at 916. (App. at 80).

more was alleged or proved, however, and there is no evidence in this case regarding the dispositions of such seizures. Seizure alone is not punishment for Double Jeopardy purposes.[13]

IV. CONCLUSION

Respondent State of Kansas respectfully requests that the Court deny the Petitions for Certiorari of both Jensen and Simpson.

Respectfully submitted,

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[13] The majority opinion in *Bryant*, above, 660 N.E.2d 290, determined a similar question but confused the distinct Double Jeopardy concepts of multiple *punishments* with multiple *prosecutions*.